Supreme Court of the United States

OCTOBER TERM, 1964

No. 82

SERGEANT HERBERT N. CARRINGTON,
PETITIONER

vs.

ALAN V. RASH, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF TEXAS

INDEX

[fol. 1]

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

No. A10104

SERGEANT HERBERT N. CARRINGTON, RELATOR

vs.

ALAN V. RASH, ET AL, RESPONDENTS

[File Endorsement Omitted]

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS—
filed April 13, 1964

TO THE SUPREME COURT OF TEXAS:

Comes now Relator, SERGEANT HERBERT N. CARRINGTON, a resident of the City of El Paso, State of Texas, complaining of the following respondents: ALAN V. RASH, MARGARET HOCKENBERRY and WAGGONER CARR, and respectfully hereby moves this Honorable Court to grant to the Relator leave to file his Petition for the Writ of Mandamus, herewith tendered, said Petition being hereby referred to and made a part of this Motion for all purposes. Accompanying this motion, Relator herewith deposits with the Clerk the sum of Fifteen Dollars as costs and stands ready to deposit an additional sum, all as required by the Rule of the Court.
[fol. 2] Relator prays that said Petition for Mandamus be filed and that the same be set down for hearing, and for relief, general and special.

Respectfully submitted,

PETICOLAS, LUSCOMBE & STEPHENS
Suite 12-E
El Paso National Bank Building
El Paso 1, Texas

By: Wayne Windle
Attorneys for Relator

[fol. 3] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 4]

[File Endorsement Omitted]

[fol. 5]

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

[Title Omitted]

PETITION FOR WRIT OF MANDAMUS—filed April 15, 1964

TO THE HONORABLE SUPREME COURT:

SERGEANT HERBERT N. CARRINGTON, hereinafter called Relator, complaining of ALAN V. RASH, MARGARET HOCKENBERRY and WAGGONER CARR, hereinafter called Respondents, for cause of action respectfully represents to the Court the following facts:

I

Alan V. Rash is the Chairman of the Republican Party Executive Committee of El Paso County, Texas. In compliance with the requirements of V.A.T.S. Election Code [fol. 6] art. 301 (d) Alan V. Rash has duly appointed Margaret Hockenberry as a "presiding judge". Acting as such "presiding judge", Margaret Hockenberry, in accordance with the authority conferred upon her by the Election Code, will, on May 2, 1964, conduct the Republican Party Primary Election in Precinct No. 16 of El Paso County, Texas. Waggoner Carr is the Attorney General of the State of Texas.

II

Relator is a Sergeant in the United States Army. He entered the service in 1946 when he was a resident of

Jefferson County, Alabama, and he has been continuously in the military service since that time.

III

Relator was born in Bessemer, Alabama, and he is now a resident of El Paso County, Texas. He is thirty-six (36) years of age. He has resided in El Paso County since February of 1962 when he and his family decided to make El Paso their permanent home, and purchased a house at 3408 Sirius Drive. Relator presently lives at this address with his wife and two children. He has a son, Bruce Allen, 8 years of age, and a daughter, Debra Lynn, 6 years of age. Both children attend the public schools in El Paso County, Texas.

IV

Relator has designated El Paso, Texas, as his permanent home for all purposes on his military records. He intends to reside in El Paso County, Texas, for the re- [fol. 7] mainder of his life. Relator is now stationed at White Sands, New Mexico. He has been stationed there since prior to 1962, and at the time he selected El Paso as his home, he had the choice of living in either New Mexico or Texas. He moved to Texas simply because he liked El Paso County and wanted to live here permanently. Because Relator has declared El Paso County to be his home for all purposes, he cannot qualify to vote in any county or state other than El Paso County, Texas.

V

Relator has paid ad valorem taxes and will pay such taxes in the future to the City of El Paso, Texas, and to the County of El Paso, Texas. Relator, in paying his Federal income taxes, has shown on his return that he resides at 3408 Sirius Drive, El Paso, Texas. He has also purchased his automobile license plates in El Paso County, Texas.

VI

Relator recently purchased a small business which was located in Las Cruces, New Mexico. He has moved the

business to El Paso County where he plans to conduct it on a partnership basis.

VII

On December 17, 1963, Relator paid the poll tax levied for the year 1963 to the County Tax Collector of El Paso County, Texas. In exchange for such payment, Relator received a poll tax receipt which states on its face that it is to be used for voting in the year 1964. He presently holds the poll tax receipt which correctly shows that he [fol. 8] was 35 years of age at the time he paid the tax; that he resides at 3408 Sirius Drive, which is in Precinct No. 16 of El Paso County; that he was born in Alabama; that he is a white, male citizen of the United States; that he has lived in El Paso, El Paso County, Texas, for at least two years; that his occupation is the United States Army. A copy of said poll tax receipt is attached to this Petition and made a part hereof for all purposes. It is labeled "Exhibit A".

VIII

On March 18, 1964, Relator through his attorney, Wayne Windle, wrote a letter to Respondent Alan V. Rash, asking said Respondent whether or not Relator would be allowed to vote in the Republican Party Primary Election to be held on May 2, 1964. Respondent Rash, in his capacity as Chairman of the Republican Party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, in her capacity as presiding judge of Precinct No. 16, El Paso County, Texas, answered by letter dated March 23, 1964, that Relator would not be allowed to vote in said election. By said letter from Respondent Rash, the Respondents Rash and Hockenberry have emphatically stated that they will refuse to allow Relator to vote in said election. The letter written by the said Wayne Windle to Respondent Rash, and the letter in reply thereto from Respondent Rash are both attached to this Petition and made a part hereof for all purposes, and are labeled "Exhibit B" and "Exhibit C" respectively.

[fol. 9]

IX

By said letter from Respondent Rash to attorney Wayne Windle, Respondents Rash and Hockenberry have admitted that Relator holds a valid poll tax receipt which states on its face that it is to be used for voting in the year 1964. Respondents Rash and Hockenberry have also admitted that said poll tax receipt correctly reflects all of the facts about him which are set forth in paragraph VII of this Petition. Despite the fact that Relator has shown to the satisfaction of Respondents that he holds a valid poll tax receipt and that he meets all of the age and residence requirements for a qualified elector in El Paso County, Texas, said Respondents have refused and will continue to refuse to recognize Relator as a qualified voter solely because he is a member of the United States Army and because he did not reside in El Paso County when he entered the service in 1946.

X

The only reason for the Respondents' refusal to recognize Relator as a qualified voter is that the Attorney General of the State of Texas, in Opinion C-173, dated November 6, 1963, concluded that the following constitutional provision is applicable to members of the Armed Forces who resided outside of the State of Texas at the time they entered the military service:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may
[fol. 10] "vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces." Article VI, Section 2, Constitution of the State of Texas.

Because of the Opinion referred to above, Waggoner Carr, the Attorney General of the State of Texas, is an interested party to this action and has, therefore, been named as a Respondent herein.

XI

As is pointed out in Relator's brief, Relator first contends that the Attorney General's interpretation of the above quoted constitutional provision is incorrect. Secondly, Relator contends that said constitutional provision is subject to more than one reasonable interpretation, and, therefore, it should be liberally construed in favor of Relator's right to vote. Thirdly, if the Attorney General's interpretation is correct, Relator contends that such provision has the effect of depriving Relator of his right to become a qualified voter in any national, state or local elections in the United States of America so long as he remains a member of the Armed Forces and resides in Texas, and, therefore, said provision violates the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

XII

Relator has a right to have the Respondents determine whether or not he is a qualified elector in El Paso [fol. 11] County, Texas, without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama. Relator has a right to establish a voting residence in Texas. Relator has a right to become a qualified voter in Texas without resigning or retiring from the military service. Relator is a qualified voter under the laws of the State of Texas, and particularly so under Article VI of the Texas Constitution and Articles 5.01 and 5.02 of the Texas Election Code. Relator has a right to vote in the Republican Party Primary Election to be held on May 2 of this year. He has a right to cast his ballot in such election in Precinct No. 16 of El Paso County, Texas.

XIII

Respondents have refused to recognize Relator's right to vote in said election. In continuing to refuse to recognize Relator's right to vote because he is a member of the United States Army and resided in Alabama when he entered the military service, Respondents are violating

their duties under the laws of the State of Texas. Respondents owe a duty to Relator to determine whether or not he is a qualified elector in El Paso County, without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama. Respondents owe a duty to Relator to recognize that Relator can establish a voting residence in Texas. Respondents owe a duty to Relator to [fol. 12] recognize that Relator can become a qualified voter in Texas without resigning or retiring from the military service. Under the laws of this state, it is the duty of the Respondents to allow Relator to vote in Precinct No. 16 in El Paso County, Texas, in the Republican Party Primary Election to be held on May 2, 1964.

XIV

Relator avers that unless this Court issues a Writ of Mandamus as herein prayed for, he has no adequate remedy at law or in equity to enable him to vote in the Republican Party Primary Election to be held on May 2 of this year.

WHEREFORE, premises considered, Relator respectfully prays that this Petition for Writ of Mandamus be set down for hearing and that upon hearing hereof, a Writ of Mandamus issue ordering and commanding Respondents to determine whether or not Relator is a qualified elector to vote in said election without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama, and Relator prays that said Writ of Mandamus further order that after such determination, Respondents shall allow Relator to vote in such election provided he shows himself to be otherwise qualified to vote.

Relator further prays that upon hearing of this Petition, that a Writ of Mandamus issue ordering and commanding Respondents not to refuse to recognize Relator as a qualified voter because he is a member of the United States Army, and because he did not reside in El Paso [fol. 13] County when he entered the military service.

Relator further prays that upon hearing of this Petition, that a Writ of Mandamus issue ordering and commanding Respondents not to prevent Relator from voting in said election for the reason that he is a member of the United States Army or for the reason that he resided in Alabama when he entered the military service.

Relator prays for such other and further relief to which he may be entitled.

Respectfully submitted,

PETICOLAS, LUSCOMBE & STEPHENS

/s/ Wayne Windle
Attorneys for Relator

[*Duly sworn to by Sergeant Herbert N. Carrington jurat omitted in printing (all in italics)*]

[fol. 14]

EXHIBIT "A" TO PETITION

THIS RECEIPT FOR VOTING IN THE YEAR 1964 EXHIBIT "A" to Petition

ORIGINAL
1963

POLL TAX RECEIPT

STATE OF TEXAS, COUNTY OF EL PASO No. 1431

Date 17 Dec 19 63

RECEIVED OF Herbert A. Carrington

Precinct No.		YEARS
16	Age	35
	State	2
	County	1
	City	1

Address 3408 Sierra Dr

Occupation U.S. Army

Born at Alabama

WHITE
COLORED

MALE
~~FEMALE~~

(Native Born) Naturalized Citizen of the United States

Party Affiliation
To Be Stamped By Election Official

the Sum of One and 75/100 Dollars in payment of Poll Tax for the year, A.D. 1963. The said Tax Payer being duly sworn by me says that the above is correct. All of which I certify.

By B. Vinson Deputy.

R. R. DEASON
Assessor and Collector of Taxes, El Paso County, Texas

[fol. 15] EXHIBIT "B" TO PETITION

LAW OFFICES
PETICOLAS, LUSCOMBE AND STEPHENS
EL PASO NATIONAL BANK BLDG.
EL PASO 1, TEXAS

532-3683
542-1981

W. C. PETICOLAS
JOHN B. LUSCOMBE, JR.
GROVER L. STEPHENS
MARK HOWELL
WAYNE WINDLE

OF COUNSEL
W. H. FRYER

March 18, 1964

Mr. Alan V. Rash
Chairman of the Executive Committee
of the Republican Party for El Paso County
First National Building
El Paso, Texas

Dear Mr. Rash:

Our firm represents Sgt. Herbert N. Carrington, who is a member of the United States Army. Sergeant Carrington would like to know whether or not he will be allowed to vote in the Republican Primary election to be held on May 2nd of this year. In determining whether or not he will be allowed to vote in such election, please consider the following facts:

> Sergeant Carrington resided in Bessemer, Alabama, in 1946 when he entered the military service. Sergeant Carrington has resided in El Paso County, Texas, since February of 1962. He owns his home at 3408 Sirius Drive, El Paso, Texas. He recently purchased a small business which he plans to operate as a partnership here in El Paso County. Since February of 1962 he has considered El Paso, Texas, as his home for all purposes. Sergeant Carrington has a valid El Paso County poll tax receipt to be used for voting in the year 1964. The receipt shows

that he was born in Alabama, that he is 35 years of age, and that he has resided in El Paso County, Texas, for more than two years. The receipt further shows that he resides in Precinct No. 16 of El Paso County, Texas, and that his occupation is the United States Army.

If Sergeant Carrington presents his poll tax receipt to the Republican Party election officials on duty at Precinct No. 16 on May 2, during the hours that the polls are open for voting and, if at such time, he satisfies the election officials that the above-stated facts about him are true, will he be allowed to vote in the Republican Primary election being held on that date?

[fol. 15a] We will certainly appreciate any information which you can give us concerning Sergeant Carrington's voting privileges.

Sincerely yours,

WAYNE WINDLE

WW:MJR

[fol. 16] EXHIBIT "C" TO PETITION

EL PASO COUNTY REPUBLICAN PARTY

ALAN V. RASH
CHAIRMAN, EXECUTIVE COMMITTEE
1305 FIRST NATIONAL BLDG.
TELEPHONE 533-3494
EL PASO 1, TEXAS

March 23, 1964

Mr. Wayne Windle
Attorney at Law
El Paso National Bank Building
El Paso, Texas

RE: Voting Rights of Sergeant
Herbert N. Carrington

Dear Mr. Windle:

I have received and carefully considered the letter from you of March 18, 1964, wherein you ask if Sergeant Herbert N. Carrington of 3408 Sirius Drive, El Paso, Texas, may vote in the Republican Primary Election on May 2, 1964, in Precinct No. 16 of this County. I have conferred in this matter with Mrs. Harold L. (Margaret) Hockenberry, the Election Judge in Precinct No. 16. She was appointed by me on March 17, 1964, to act as such Judge in the polling place for the Republican Primary Election. In your letter you have set out certain facts concerning Sergeant Carrington's military status, place of residence, and other qualifications as a requirement to vote, and inquire as to whether he would be considered a qualified elector.

It is my opinion, as Chairman of the Republican Party Executive Committee for El Paso County, that Sergeant Carrington will be unable to vote in the Republican Primary Election on May 2, of this year. Mrs. Hockenberry, as Election Judge, has joined with me in this opinion. However, our opinion is tendered with regret for Sergeant Carrington's position. We have no choice, as public officials, of this State, but to comply with the opinion of the Attorney General of the State of Texas which interprets the Election Laws.

The most recent opinion in this regard by the Attorney General is numbered C-173 and dated November 6, 1963. [fol. 17] This opinion contains an interpretation of Article VI, Section 2 of the Texas Constitution and its statutory counterparts, Articles 5.01 and 5.02 of the Texas Election Code. It states that the Constitutional provision in question applies to members of the Armed Forces of the United States who entered the service outside the State of Texas. The applicable provision of Article VI, Section 2 of the Texas Constitution states as follows:

> ". . . Any member of the Armed Forces of the United States, or component branches thereof, or in the military service of the United States, may vote only in the County in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

In interpreting this provision, the Attorney General's opinion contains the following statements:

> ". . . It goes without saying that the Texas Constitution cannot regulate voting rights of persons at any place other than within the State of Texas, and can not affect the voting rights of residents of other States while stationed in Texas. This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering service, and if at that time he did not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.
>
> ". . . As we view it, the purpose of the restriction is to prevent a concentration of military voting strength in locations where military installations are situated, which 'might well lead to complete domina-

[fol. 18] tion and control of local politics by the overwhelming number of military men to the prejudice of the civilian citizens of the community.' Interpretative commentary under Art. VI, Sec. 1, Vernon's Ann. Tex. Const., Vol. 2, P. 336. The concentration sought to be prevented could come about from voting by former residents of other states as readily as from voting by former residents of other counties in this State. We fail to see the rationale for allowing a resident of some other state who is stationed at Fort Bliss to acquire a voting residence in El Paso County, while denying that privilege to a resident of Texas; . . .'

"We are not impressed by the suggested explanation that the person who resided in Texas at the time of entering service does have a place to vote in Texas (i. e., the county of his residence at the time of his entering service), but the person who resided in some other State at the time of entering service would have no place to vote in Texas if he could not acquire a voting residence at the place where he was stationed. The 1954 Amendment evinces an intention to remove the disfranchisement of active members of the regular military establishments, but subject to the limitation that they will not be allowed to acquire a new voting residence in this State while in the military service. It does not show an intention to enfranchise any person or class of persons in military service on any other terms. It should be kept in mind that a person who enters military service as a resident of some other State gives up his voting residence in that State only by his own volition. . . . If he loses his residence and voting privileges at the place where he resided when he entered service, it is by his own desire to acquire a new residence at a different place. . . ."

In view of this opinion, numbered C-173, as stated above, and in view of the former opinions of the Attorney General numbered S-148 and WW-157, dated December 18, 1954 and July 8, 1957, respectively, Mrs. Margaret

Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified [fol. 19] voter. We have taken this position because he is in the United States Army and he resided outside the State of Texas at the time he entered military service.

By reaching these conclusions, we do not mean to infer that we agree with the opinion of the Attorney General of the State of Texas. In order to make the record clear, we believe that the Attorney General's office has misconstrued the purpose and intent of Article VI, Section 2 of the Texas Constitution. However, as stated above, we have no choice but to abide by these opinions as public officials of this State. Please make it clear to Sergeant Carrington that we regret deeply the action that we have taken, but hope that a future clarification of this problem will be made so that Sergeant Carrington and other members of our fine military establishment will be permitted to vote in this State in the future. Thank you for your attention and consideration.

Sincerely,

/s/ Alan V. Rash
ALAN V. RASH
County Chairman

AVR:hb

cc: Mrs. Margaret Hockenberry
3502 Capella Street
El Paso, Texas

[fol. 20] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 21] IN THE
SUPREME COURT OF TEXAS

Austin, Texas

[Title Omitted]

[File Endorsement Omitted]

ANSWER OF RESPONDENTS—Filed April 17, 1964

TO THE HONORABLE SUPREME COURT:

Now come Respondents ALAN V. RASH and MARGARET HOCKENBERRY and file this their answer to Relator's Petition for Writ of Mandamus.

[fol. 22] I.

Respondents admit the facts alleged in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of Relator's Petition for Writ of Mandamus. Respondents specifically admit that Relator meets all of the requirements necessary to become a qualified elector in El Paso County, Texas, except for the fact that he is a member of the United States Army and entered the military service while residing in Alabama.

II.

In reply to Paragraphs XI, XII, XIII, and XIV of the Petition for Writ of Mandamus, Respondents say that it is their opinion that the Attorney General's interpretation of Article VI, Section 2, of the Constitution of the State of Texas is incorrect and totally inequitable and that Relator should not be denied the privilege of voting solely because he is a member of the United States Army and entered the military service while residing in Alabama. Respondents firmly believe that no one otherwise qualified to vote should be denied that privilege merely because of current service in the Armed Forces of the United States, regardless of where he or she entered the service.

[fol. 23] Nevertheless, because the Attorney General's opinion is presently the most authoritative ruling on the

Constitutional provision in question, Respondents feel compelled to, and indeed positively will, abide by such opinion and interpretation and, accordingly, will not recognize Relator as a qualified elector in El Paso County so long as he remains in the military service, unless the Supreme Court rules otherwise.

Respondents are currently preparing to conduct the Republican Primary in El Paso County on May 2, 1964. It is of the utmost importance that an early decision be reached by the Court in order that Respondents and all other similarly situated in the State of Texas may determine the proper course to take regarding Relator and others like him similarly situated. Therefore, Respondents urge the Court to decide the issues raised by Relator at the earliest possible time.

/s/ Tad R. Smith
TAD R. SMITH
1500 First National Bldg.
El Paso, Texas
Attorney for Respondents

[fol. 24] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 25] [File Endorsement Omitted]

[fol. 26] IN THE
SUPREME COURT OF TEXAS

[Title Omitted]

ANSWER OF RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS—Filed April 21, 1964

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now comes Respondent WAGGONER CARR, as Attorney General of the State of Texas, and files this his answer to Relator's Petition for Writ of Mandamus.

I.

Respondent does not deny or question the truth of the facts alleged in Paragraphs I, II, III, IV, V, VI, VII, and VIII of Relator's petition.

II.

In opposition to Relator's petition, Respondent asserts [fol. 27] that Relator is not a qualified voted of the State of Texas, and that he will not be a qualified voter and eligible to vote in the Republican primary election to be held on May 2, 1964, if he is on active duty as a member of the Armed Forces of the United States on that date.

III.

Respondent does not deny that Relator is a legal resident of the State of Texas or that this residence carries with it all the rights, privileges and duties of residence except the right or privilege of voting and those rights, privileges and duties which are based on a resident's being a qualified voter. Respondent does not deny that Relator was liable for payment of the poll tax levied for the year 1963 or that upon payment he was entitled to a receipt therefor, but Respondent asserts that issuance of a poll tax receipt to Relator stating on its face that it is to be used for voting in the year 1964 has not conferred any right of privilege of suffrage upon him.

IV.

Respondent asserts that by virtue of the provision in Article VI, Section 2 of the Constitution of Texas which was added by amendment in 1954, Relator is precluded from becoming a qualified elector of the State of Texas during the time that he continues in military service. This provision reads:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

[fol. 28]

V.

Respondent asserts that the withholding from Relator of the privilege to vote in this State does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or any other provision of that document, and that the provisions of Article VI, Section 2 of the Texas Constitution and of Article 5.02 of Vernon's Texas Election Code which Relator attacks in this suit are valid.

WHEREFORE, Respondent prays that the writ of mandamus be denied and that all costs of this proceeding be adjudged against Relator.

WAGGONER CARR
Attorney General of Texas

MARY K. WALL
Assistant Attorney General
of Texas

P. O. Drawer R
Capitol Station
Austin, Texas 78711
Attorneys for Respondent

[fol. 29] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 30]

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

No. A-10104

SERGEANT HERBERT N. CARRINGTON, RELATOR

v.

ALAN V. RASH ET AL., RESPONDENTS

ORIGINAL MANDAMUS PROCEEDING

OPINION—delivered April 29, 1964

This proceeding presents for decision the question of whether a nonresident at the time of entering the regular military service of the United States can acquire a voting residence in Texas so long as he is in the military service. We hold that he may not.

Relator, Herbert N. Carrington, is a sergeant in the United States Army. He entered the military service in 1946, at which time he was a resident of Alabama. He has been stationed at White Sands, New Mexico, and has resided in El Paso County, Texas, since February, 1962. He has purchased a home in El Paso, pays taxes in El Paso, registers his automobile in El Paso, and has purchased a poll tax in El Paso. He says that El Paso County is his legal residence, and we assume that such is the case.

Relator desires to vote in the Republican Party Primary Election to be held on May 2, 1964. Respondent, Alan V. Rash, is Chairman of the Republican Party Executive Committee of El Paso County and the Respondent, Margaret Hockenberry is the Presiding Judge of the precinct in which Relator would vote. These Re-

spondents have informed Relator that he will not be [fol. 31] permitted to vote because of the opinion of the Attorney General of Texas, dated November 6, 1963, holding that a former nonresident in the position of Relator may not vote in Texas.

Prior to 1954, and for over a hundred and twenty years, the Constitution of Texas disqualified members of the regular military establishments of the United States from voting in this state. This included both native residents and former nonresidents. Pursuant to proper legislative action, there was submitted in 1954, and adopted by a vote of the people, an amendment to Suffrage Article VI of the Constitution of Texas. As relevant here, this amendment for the first time enfranchised members of the regular military forces of the United States to the following extent:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military services of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The self-evident purpose of the amendment to the Constitution was to prevent a person entering military service as a resident citizen of a county in Texas from acquiring a different voting residence in Texas during the period of his military service, and to prevent a person entering military service as a resident citizen of another state from acquiring a voting residence in Texas during the period of military service. Relator argues that the intent of the 1954 amendment was to enfranchise all members of the Armed Forces but to restrict only the voting residence of those individuals entering the military service from Texas to the county of their residence; in other words, says Relator, a former nonresident may choose and [fol. 32] change his voting residence in Texas, a privilege denied to original residents of Texas. We do not regard this as a reasonable or plausible construction of the amendment. To so narrowly construe the amendment would be inconsistent with the history of the provisions

of the Texas Constitution with respect to the exercise of suffrage by persons in military service. As before mentioned, no member of the regular military establishments could vote in Texas prior to the 1954 amendment, and it is not reasonable to say that the Legislature in submitting the amendment, and the people in their favorable vote thereon, intended to free from all restrictions based on military service those persons who had entered such service as residents of another state, but to restrict those persons entering military service as residents of Texas to the right to vote in the county in which they resided at such time. Such a construction would, in effect, create a discrimination against residents of the state. Moreover, the very purpose of the disfranchisement of military personnel for so long, and the obvious purpose of restricting the vote of a Texas resident to the county in which he resided at the time he entered the military service, was to prevent a concentration of military voting strength in areas where military bases are located. This basic purpose and policy would be frustrated if individuals in the military service who were former residents of another state could choose and change their voting residence while stationed in Texas.

Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence. They are residents in a particular place for a particular period of time under compulsion of military or-
[fol. 33] ders; they do not elect to be where they are. Their reasons for being where they are, and their interest in the political life of where they are, cannot be the same as the permanent residents. This is not to say that military personnel are any less citizens; it is to say that military personnel in the nature of their sojourn at a particular place are not, and cannot be, a part of the local community in the same sense as its permanent residents. Denying to such personnel the right of suffrage in the place where they may be stationed—while in no sense denying the exercise of such right in their place of original residence—is not unreasonable and the classification established is nondiscriminatory. The voting restrictions operate alike upon all members of the class.

Both the original resident and former nonresident lose the right to vote in Texas upon a change in their legal residence after entering the military service. The nonresident voluntarily gives up his right to vote in his original state of residence by changing his legal residence to Texas. The resident voluntarily gives up his right to vote by changing his legal residence to another county in Texas.

This is not to say that the Texas Constitution purports to, or can, restrict the voting rights of persons in other states. Texas cannot, of course, extraterritorily regulate or limit the voting residence of a person entering the military service as a resident of another state so long as such person remains a citizen of the other state. The Texas Constitution can, however, declare the policy that the enfranchisement of a person in military service shall be limited to the exercise of suffrage in the county in which the person resided at the time of entering the [fol. 34] service. The effect on former nonresidents is that they may not acquire a voting residence in Texas; the effect upon original residents is that they may not change their voting residence from one county to another.

This construction does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in its provision that no state shall deny to any person within its jurisdiction the equal protection of the laws. Involved is the question of the reasonableness of the classification; or, to express it otherwise, there is involved the question of whether the 1954 amendment as so construed results in a discrimination which offends the Federal Constitution. The Supreme Court of the United States has long recognized that "the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution. . . . *A State, so far as the Federal Constitution is concerned, may provide by its own Constitution and laws that none but native-born citizens shall be permitted to vote*, as the Federal Constitution does not confer the right of suffrage

upon any one, and the conditions under which that right is to be exercised are matters for the State alone to prescribe, subject to the conditions of the Federal Constitution, already stated. . . ." (Italics are added) Pope v. Williams, 193 U. S. 621, 632, 633, 24 S. Ct. 573, 4 L. Ed. 817. The case involved a Maryland statute which provided that a nonresident coming into the state to reside must have filed a declaration of intent so to do a year before [fol. 35] he should have the right to be registered as a voter in the state. The statute was unsuccessfully attacked as violating a federal right of the new resident of Maryland.

Later, in 1959, The United States Supreme Court reaffirmed the foregoing principles, saying:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, . . . absent of course the discrimination which the Constitution condemns. . . . So while the right of suffrage is established and guaranteed by the Constitution . . . it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. . . . We do not suggest that any standards which a state desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction." Lassiter v. North Hampton Board of Elections, 360 U. S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072.

The Supreme Court in this case sustained a statute of North Carolina which required that prospective voters be able to read and write in the English language any section of the Constitution of the state.

In Gray v. Sanders, 373 U. S. 368, 83 S. Ct. 801, 9 L. Ed.2d 821 [holding that Georgia county unit system violated the equal protection clause of the Fourteenth Amendment] the Court reaffirmed the principle that "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is

used as an instrument for circumventing a federally protected right."

We do not believe that a resident of another state upon entering the military service possesses a "federally protected right" to vote in Texas elections while in the mili-
[fol. 36] tary service in whatever county or district in Texas to which he may elect to change his voting residence. The provision of the Texas Constitution under review does not result in the loss of the right of the nonresident to retain his voting privileges under the laws of the state of his residence when he entered the service; its effect is only that a resident of another state entering military service cannot later give up his former residence, and with it the right to vote in such state, and thereupon, while in the military service, acquire a voting residence in Texas.

The petition for writ of mandamus is denied.

ZOLLIE STEAKLEY
Associate Justice

Chief Justice Calvert and Associate Justice Smith dissenting.

Opinion delivered

April 29, 1964.

[fol. 37] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 38]

* * * *

DISSENTING OPINION—delivered April 29, 1964

This is an original petition for writ of mandamus filed by Relator, Herbert N. Carrington, to compel respondents to determine whether or not Relator is a qualified elector for the purpose of voting in the Republican party primary to be held on May 2, 1964, without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama. Respondents in this proceeding are Honorable Waggoner Carr, Attorney General of Texas; Honorable Alan V. Rash, Chairman of the Republican party Executive Committee of El Paso County, Texas, and Honorable Margaret Hockenberry, the "presiding judge" who will conduct the Republican party primary election in Precinct No. 16 of El Paso County, Texas.

Relator is a Sergeant in the United States Army. He entered the service in 1946, when he was a resident of Jefferson County, Alabama, and has been continuously in the military service since that time. It is undisputed that Relator is at present a resident of El Paso County, Texas, where he and his family have resided since February, 1962. He has designated El Paso, Texas, as his permanent home for all purposes on his military records, has paid ad valorem taxes and will pay such taxes in the future to the City of El Paso and to the County of El Paso, and has shown on his federal income tax return that he resides in El Paso, Texas.

On December 17, 1963, Relator paid the poll tax levied for the year 1964 to the County Tax Collector of El Paso County, Texas. Thereafter, on March 18, 1964, Relator wrote a letter to Respondent Rash, asking whether or not Relator would be allowed to vote in the Republican party [fol. 39] primary election to be held on May 2, 1964. Respondent Rash, in his capacity as Chairman of the Republican party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, as "presiding judge" of Precinct No. 16, answered by letter that:

> "Mrs. Margaret Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified voter. We have taken this position because he is in the United States Army and he resided outside the State of Texas at the time he entered military service."

In 1954 the following amendment was added to Article VI, Section 2, Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Articles 5.01 and 5.02 of the Texas Election Code restate, in effect, the law as contained in the above amendment.

Prior to Relator's correspondence with the Respondents, Rash and Hockenberry. the Respondent Attorney General, in an opinion, had interpreted the above amendment and its statutory counterparts. In interpreting these provisions, the Attorney General's opinion stated in part:

> ". . . It goes without saying that the Texas Constitution cannot regulate voting rights of persons at any place other than within the State of Texas, and can not affect the voting rights of residents of other States while stationed in Texas. This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering service, and if at that time he did not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service."

Based on this opinion, Respondents Rash and Hockenberry refused to recognize Relator as a qualified voter.

Relator first contends that the Attorney General's interpretation of the above-quoted Constitutional provision [fol. 40] is incorrect. It is Relator's position that the provision was not intended to apply to members of the Armed Forces who were *not* residents of the State of Texas at the time they entered the military service, but who are now residents of Texas. Instead, Relator contends that the Constitutional amendment was intended to apply only to servicemen who resided in Texas when they entered the service.

Relator next argues that if the Constitutional amendment in question does apply to persons who resided in Texas and those who resided elsewhere at the time of entering service, then the amendment constitutes an unlawful discrimination *within the class* of military personnel; and, therefore, violates the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution. Relator bases this argument upon the theory that the Constitutional amendment, if applied to all military personnel, discriminates against those servicemen who were *not* residents of Texas at the time of entering the service. To illustrate this alleged discrimination, Relator argues that a serviceman such as himself, who enters the Armed Forces in another state, and thereafter establishes his residence in Texas, is deprived of the right to become a qualified voter in any election so long as he resides in Texas and remains a member of the Armed Forces. This is so because when he acquires a new residence in Texas, he loses his voting privilege at the place where he resided when he entered service, and he cannot meet the residence requirements of Texas. Therefore, he is left without a place to vote. On the other hand, Relator argues that the Constitutional provision in question does not so deprive a serviceman, who was a resident of Texas at the time he entered the Armed Forces, of his right to vote. According to Relator, a serviceman who resides in Harris County, Texas, at the time he enters the Armed Forces, and who thereafter changes his legal residence to El Paso County, Texas, can still remain a qualified voter

in Harris County. Thus, Relator concludes the Constitutional provision unlawfully discriminates within the class of military personnel.

[fol. 41] Respondents argue that the provision in Article VI, Section 2, of the Texas Constitution was intended to apply to persons who were not residents of Texas at the time of entering service, *and* to persons who were Texas residents. Respondents further contend that this provision does not violate the Fourteenth Amendment of the United States Constitution because *regardless of* where a serviceman resided at the time of entering service, if he changes his legal residence while in service in Texas, he relinquishes his right to vote anywhere.

In my opinion, a determination of this proceeding does not rest upon whether or not the Constitutional provision under attack unlawfully discriminates *within* the class of military personnel, as contended by Relator. Even assuming that it does not, as Respondents so argue, this still does not settle the ultimate constitutional problem as to whether a state may segregate *all* persons in military service as a class, which class is to be treated differently from other persons in regard to the right to vote. In my opinion, such a distinction is arbitrary and unreasonable, thereby violating the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

I fully recognize that the Federal Constitution, or any of its amendments, does not give to a person the privilege to vote in any state. See Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627. It is clear that the privilege to vote in a state is within the jurisdiction of the state itself, "to be exercised as the state may direct. . . ." Pope v. Williams, 193 U. S. 621 (1904). In fact, the Federal Constitution makes voters' qualifications rest on state law even in federal elections. Art. 1, § 2. However, in exercising its broad powers to determine the conditions under which the right of suffrage may be exercised, the state cannot impose standards which the United States Constitution condemns as discriminatory. See Lassiter v. Northampton County Board of Elections, 360 U. S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072.

[fol. 42] It is elementary that "class legislation" is invalid where the classification is arbitrary and unreasonable. The classification must rest on real and substantial differences and must reasonably promote some proper object of public welfare or interest. Thus, without contravening any restriction that Congress has imposed, a state can determine that only those persons who are literate should vote since "[t]he ability to read and write . . . has *some relation* to standards designed to promote intelligent use of the ballot." Lassiter v. Northampton County Bd. of El., supra.

In the present case Respondents contend that the purpose of the Constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to complete domination and control of local politics by military men to the prejudice of the civilian citizens of the community. In my opinion this is not a reasonable ground upon which the State can say that there exists a real and substantial difference between servicemen and other citizens, and thereby confer different voting rights on these classes.

With present day mobility and industrialization, large groups, *other than servicemen*, move into the various communities of this state for limited stays, and establish voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact.

Wherein lies the reasonable basis for distinguishing between these groups?

In the recent case of Gray v. Sanders, 372 U. S. 368, 9 L. Ed. 2d 821, 8 S. Ct. 801 (1963), our Supreme Court has said:

> ". . . there is no indication in the Constitution that homesite or *occupation* affords a permissable basis for distinguishing between qualified voters within a state. . . ." (Emphasis added.)
>
> ". . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—

whatever their race, whatever their sex, *whatever their occupation*, whatever their income, and wherever
[fol. 43] their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those *who meet the basic qualifications* . . ." (Emphasis added.)

In the present case, Relator has proven to the satisfaction of Respondent that he meets the basic qualifications of holding a valid poll tax receipt, and that he meets all of the age and residence requirements for a qualified elector in El Paso County, Texas. The Respondents do not contend that Relator is unqualified to vote because he is immature, or is of unsound mind, or is a criminal or a public charge. Instead, by Respondent's own admission, Relator is unqualified *solely* because he is a member of the Armed Forces, who resides in Texas. Such a "distinction" does not fulfill the test of reasonableness of classification as required by the Fourteenth Amendment of the United States Constitution. Moreover, the considerations which are recited in the majority opinion as affording a sound basis for denying the right to vote to members of the Armed Forces apply only to local elections; but the effect of the majority opinion is to deny the right to vote in *all* elections, even in the election of a President of the United States.

Inasmuch as Article VI, Section 2 of the Texas Constitution violates the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, Relator's petition for writ of mandamus should be granted.

CLYDE E. SMITH
Associate Justice

Chief Justice Calvert joins in this dissent.

Opinion delivered: April 29, 1964

[fol. 44] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 45]

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

April 29, 1964.

No. A-10104

SERGEANT HERBERT N. CARRINGTON

vs.

ALAN V. RASH ET AL.

Original Mandamus

JUDGMENT—dated April 29, 1964

This cause came on to be heard on petition of relator, Sergeant Herbert N. Carrington, for writ of mandamus, filed herein on April 15, 1964, and said petition, together with the record and briefs and argument of counsel, having been duly considered, because it is the opinion of the Court (Chief Justice Calvert and Associate Justice Smith dissenting) that the writ of mandamus as prayed for should not issue, it is therefore adjudged, ordered and decreed that the petition for writ of mandamus be, and hereby is, in all things denied.

It is further ordered that relator, Sergeant Herbert N. Carrington, pay all costs incurred in this proceeding in this Court.

[Clerk's Certificate to foregoing paper omitted in printing]

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 32, October Term, 1964

SERGEANT HERBERT N. CARRINGTON, PETITIONER

vs.

ALAN V. RASH, ET AL.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 747699 319

No. 82

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SERGEANT HERBERT N. CARRINGTON,
Petitioner

V.

ALAN V. RASH, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

W. C. PETICOLAS
PETICOLAS, LUSCOMBE & STEPHENS
12E El Paso National Bank Bldg.
El Paso 1, Texas
Attorneys for Petitioner.

INDEX

CITATIONS

Cases:

Statutes:

Constitutions:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

SERGEANT HERBERT N. CARRINGTON,
Petitioner

v.

ALAN V. RASH, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner, SERGEANT HERBERT N. CARRINGTON, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas entered on April 29, 1964, in *Sergeant Herbert N. Carrington vs. Alan V. Rash, et al.* That judgment finally denied Petitioner's Original Petition for Writ of Mandamus filed originally in the Supreme Court of Texas pursuant to Article 1735 (a) of the Revised Civil Statutes of Texas. Said Petition requested that Court to issue a Writ of Mandamus ordering and commanding the Respondents (1) to determine whether or not Petitioner was a qualified

elector to vote in the Republican party primary election without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama; (2) not to refuse to recognize Petitioner as a qualified voter because he is a member of the United States Army and because he did not reside in El Paso County when he entered the military service; (3) not to prevent Petitioner from voting in said election for the reason that he is a member of the United States Army or for the reason that he resided in Alabama when he entered the service.

OPINIONS BELOW

The Supreme Court of Texas has issued an opinion in this case, a copy of which appears in Appendix A to this Petition, at page 1a. The opinion has not yet been reported. A copy of the judgment of the Supreme Court of Texas appears in Appendix B to this petition, at page 1b.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on April 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

In 1954, the following provision was added to Section 2 of Article VI of the Texas Constitution:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The Supreme Court of Texas held in its decision rendered on April 29, 1964, that, by virtue of this provision, a nonresident at the time of entering the military service of the United States cannot acquire a voting residence in Texas so long as he is the military service. The question thus presented is:

> **Does the provision of the Texas Constitution which prevents persons in the military service from acquiring a voting residence in the county in which they are bona fide legal residents for all other purposes constitute such discrimination against persons in the military service as to violate the equal protection clause of the Fourteenth Amendment?**

CONSTITUTIONS INVOLVED

This case involves the last provision of Article VI, Section 2 of the Constitution of the State of Texas. Said provision is set out verbatim in the preceding paragraph. It may be found in Volume 2 of Vernon's Annotated Texas Constitution, on pages 339 and 340.

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"
> (emphasis added)

STATEMENT

Preliminarily, Petitioner respectfully requests the Court to note that time is of the essence in this case. The

Texas Republican Party second primary election, which will determine the Texas Republican Party nominee for the United States Senate, is scheduled for June 6, 1964. On that date, Petitioner will have his last opportunity to vote in the 1964 Republican Party primary election. Accordingly, Petitioner has filed a motion under Rule 43 (4) to advance the hearing and disposition of this case sufficiently to enable it to be disposed of prior to June 6. In addition, Petitioner is ready to meet any schedule for briefing and oral argument that the Court may wish to set. This Petition may, if Certiorari is granted and the Court wishes, be treated as Petitioner's brief on its merits. Telegraphic notice of all these steps has been given to counsel for respondents. It is submitted that this expedited procedure is authorized by another primary election case, *Ray vs. Blair*, 343 U.S. 901 (1952), in which certiorari was granted on March 24, 1952, the case argued on March 31, 1952, and a decision announced on April 3, 1952. See 343 U.S. 154, 214.

Respondents in this proceeding are Honorable Waggoner Carr, Attorney General of Texas; Honorable Alan V. Rash, Chairman of the Republican Party Executive Committee of El Paso County, Texas; and Honorable Margaret Hockenberry, the "Presiding Judge", who by law has the duties of conducting the Republican Party primary elections in Precinct No. 16 of El Paso County, Texas.

Petitioner is a Sergeant in the United States Army. He entered the service in 1946 when he was a resident of Jefferson County, Alabama, and he has been continuously in the military service since that time.

Petitioner was born in Bessemer, Alabama, and he is now a resident of El Paso County, Texas. He is thirty-

six (36) years of age. He has resided in El Paso County since February of 1962 when he and his family decided to make El Paso their permanent home, and purchased a house at 3408 Sirius Drive. Petitioner presently lives at this address with his wife and two children. He has a son, Bruce Allen, 8 years of age, and a daughter, Debra Lynn, 6 years of age. Both children attend the public schools in El Paso County, Texas.

Petitioner has designated El Paso, Texas, as his permanent home for all purposes on his military records. He intends to reside in El Paso County, Texas, for the remainder of his life. Petitioner is now stationed at White Sands, New Mexico. He has been stationed there since prior to 1962, and at the time he selected El Paso as his home, he had the choice of living in either New Mexico or Texas. He moved to Texas simply because he liked El Paso County and wanted to live here permanently. Because Petitioner has declared El Paso County to be his home for all purposes, he cannot qualify to vote in any county or state other than El Paso County, Texas.[1]

In paragraph III of Respondent Carr's Answer to the Petition for Writ of Mandamus, said Respondent stated:

> "Respondent does not deny that Relator is a legal resident of the State of Texas or that this residence carries with it all the rights, privileges and duties of residence except the right or privilege of voting and those rights, privileges and duties which are based on a resident's being a qualified voter."

On December 17, 1963, Petitioner paid the poll tax levied for the year 1963 to the County Tax Collector of El Paso County, Texas. In exchange for such pay-

[1]It can readily be seen from the Petition for Writ of Mandamus and the Answers of the Respondents that all facts presented in this "Statement" have been admitted.

ment, Petitioner received a poll tax receipt which states on its face that it is to be used for voting in the year 1964. Thereafter, on March 18, 1964, Petitioner wrote a letter to Respondent Rash, asking whether or not Petitioner would be allowed to vote in the Republican Party primary election to be held in 1964. Respondent Rash, in his capacity as Chairman of the Republican Party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, as "Presiding Judge" of Precinct No. 16, answered by letter that:

> "Mrs. Margaret Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified voter. We have taken this position because he is in the United States Army and he resided outside the State of Texas at the time he entered the military service." (See Exhibit "C" of the Petition for Writ of Mandamus.)

In 1954 the following provision was added to Article VI, Section 2, Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Prior to Petitioner's correspondence with the Respondents, Rash and Hockenberry, the Respondent Attorney General, in an opinion, had interpreted the above quoted provision of Section 2 of Article VI of the Texas Constitution in the following manner:

> ". . . This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after enter-

> ing service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering service, and if at that time he did not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that *no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.*" (emphasis added)

Based on this opinion, Respondents Rash and Hockenberry refused to recognize Petitioner as a qualified voter.

Upon receiving the letter from Respondents Rash and Hockenberry, which is Exhibit "C" attached to the Petition for Writ of Mandamus, Petitioner filed an Original Petition for Writ of Mandamus in the Supreme Court of the State of Texas. In said Petition for Writ of Mandamus, Petitioner contended that the above quoted provision of the Texas Constitution discriminated against persons in the military service, and, therefore, violated the equal protection clause of the Fourteenth Amendment. Said contentions were presented in Petitioner's brief and upon oral argument. The Supreme Court of Texas divided on the question of whether or not the Texas Constitution violated the Fourteenth Amendment, and said Petition for Writ of Mandamus was finally denied in a seven to two decision. The majority and dissenting opinions appear in Appendix A of this Petition.

REASONS FOR GRANTING THE WRIT

This case concerns the rights of members of the Armed Forces to participate in elections. A provision of the Texas Constitution has been construed to deny servicemen who are admittedly legal residents of Texas the right to acquire a voting residence in Texas. As can

be seen from the majority and dissenting opinions attached to this Petition, servicemen who are legal residents of Texas but who acquired such residence after entering the military service, cannot vote anywhere in the United States in any election so long as they remain in the military service. Accordingly, important questions of federal constitutional law are presented which have not been, but should be, resolved by this Court.

The following statements appear in the dissenting opinion delivered in this cause in the Supreme Court of Texas:

> "Petitioner argues that a serviceman such as himself, who enters the Armed Forces in another state, and thereafter establishes his residence in Texas, is deprived of the right to become a qualified voter in any election so long as he resides in Texas and remains a member of the Armed Forces. This is so because when he acquires a new residence in Texas, he loses his voting privilege at the place where he resided when he entered service, and he cannot meet the residence requirements of Texas. Therefore, he is left without a place to vote."

The right to vote, which is being denied to persons in the military service, is the indispensable condition of all others rights guaranteed by the Constitution. This Court has often so stated, most recently in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964): "Other rights, even the most basic, are illusory if the right to vote is undermined." In *Gray v. Sanders*, 372 U.S. 368, 375 n.7 (1963): " 'A right that a man has to give his vote . . . is a most trascendent thing, and of a high nature . . .' " (quoting Holt, L.C.J., in *Ashby v. White*, 2 Ld. Raym 938, 953 (K.B. 1702). The right to vote, moreover, includes the right not only to cast a ballot, but to have one's ballot

counted, and to have it counted just as much as any other citizen's. See *Wesberry v. Sanders*, supra, at 17; *Gray v. Sanders*, supra, at 379-80; *United States v. Classic*, 313 U.S. 299 (1941). The right extends to all phases of the political process, including participation in primary elections and nominating conventions. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, supra at 330 (1941) (Douglas, J., dissenting in part).

The majority opinion which appears in Appendix A of this Petition states:

> "The nonresident voluntarily gives up his right to vote in his original state of residence by changing his legal residence to Texas. The resident voluntarily gives up his right to vote by changing his legal residence to another county in Texas."

In connection with the above statement, it is abundantly clear that Petitioner by having changed his legal residence to Texas cannot qualify to vote in any other state because he cannot meet the residence requirements of any other State. However, there are no facts in this case which indicate that Petitioner voluntarily gave up his right to vote in his original state of residence. Under the facts of this case, since Petitioner was only 18 years of age when he entered the service, it is most likely that he never had an opportunity to acquire a voting residence in any state before moving to Texas. Indeed, if all states had the same constitutional provision as Texas, Petitioner most certainly could not have acquired a new voting residence since he entered the military service in 1946.

So far as Petitioner can ascertain, Texas is the only state in the United States which denies voting privileges to a legal resident of the state solely for the reason that

he is in the military service. Only members of the military service have been the object of such discrimination. Such discrimination is arbitrary and unfair because men and women who are members of the Armed Forces should at least have the same voting privileges as members of other professions.

As stated in the dissenting opinion attached to this Petition, it is elementary that "class legislation" is invalid where the classification is arbitrary and unreasonable. The classification must rest on real and substantial differences and must reasonably promote some proper object of public welfare or interest. (See *Lassiter v. Northampton County Bd. of El.*, 360 U.S. 45, (1959).

Under the interpretation which has been given to the last provision of Article VI, Section 2 of the Texas Constitution, such provision by prohibiting members of the military from acquiring a new voting residence while they are in the military service in Texas, defines and creates a special class within this State which, for no reason, is denied the rights and privileges which all other United States citizens possess. Apparently no argument is advanced that the class of persons created by this interpretation is not fit to be voters because they are immature, or are of unsound mind or are criminals or public charges. The only thing that can be found to distinguish them from other citizens is that they are members of the Armed Forces.

In the present case, Respondent Carr contends that the purpose of the constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to "complete domination and control of local politics" by military men to the prejudice of the civilian citizens of the community. It is our position that this contention is misleading

because there is no proof that there is any such area where the military voting strength would control the local politics, because as a practical matter, many servicemen are not qualified voters in that they are either below the age of 21 years, are not bona fide residents of the State of Texas, or have failed to pay the poll tax or register for voting in a federal election. However, it is our contention that if a majority of qualified electors in a particular community happen to be members of the military service, then like any other voting majority, they are entitled to exercise complete dominion and control over local politics.

Not unlike most civilians who move to Texas, Petitioner voluntarily selected Texas to be his permanent home. Petitioner was not forced to move to Texas because of his occupation. In fact, Petitioner is stationed at White Sands, New Mexico, and lives in Texas simply because he likes the City of El Paso, Texas. If the matter of concern were that persons in the military service acquire a new residence by the order of their superiors and not by their own choice, and that merely living in one county is no proof of a desire to make it their permanent residence, the remedy would be to prescribe what acts are necessary for military personnel to prove the requisite intent to establish permanent residence, rather than to prevent the possibility of establishing residence for voting, no matter what the quantum of proof that their intended home is their newly acquired residence. To foreclose this posibility is to arbitrarily deny military personnel stationed in Texas equal protection of the laws.

As stated in the dissenting opinion attached hereto, "With present day mobility and industrialization, large groups, other than servicemen, move into various communities of this state for limited stays, and establish

voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact." Petitioner strongly contends that it is unfair and unreasonable discrimination to allow the civilian population to acquire a new voting residence in Texas but to deny such privilege to persons in the military service solely for the reason that they are in the military service. In the recent case of *Gray v. Sanders*, 327 U.S. 368, (1963), this Court said:

> " . . . there is no indication in the Constitution that homesite or *occupation* affords a permissable basis for distinguishing between qualified voters within a state . . . " (emphasis added)
>
> " . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, *whatever their occupation*, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those *who meet the basic qualifications* . . . " (emphasis added)

The tendency of the law in this Country is to enfranchise, not disfranchise. We urge this Court to follow this tendency by extending equal protection of the laws to servicemen and civilians alike.

THE QUESTIONS PRESENTED ARE NOT MOOT

The argument may be advanced by Respondent Carr that the questions presented by Petitioner's Petition for

Writ of Mandamus are now moot. This argument, if advanced, is not valid. As can be seen from the record, Petitioner in the Texas Supreme Court requested an order that would permit him to vote in the Texas Republican Party primary election. The general primary election was held on May 2 of this year. Since none of the candidates seeking the Republican nomination for the United States Senate received a majority of the votes on that date, no candidate has become the nominee for such office, and it is necessary, under the election laws of Texas, that a second primary election be held on June 6, 1964. In this second primary election, the Respondents are by law compelled to perform the same duties as they were obligated to perform in that portion of the primary election which was conducted on May 2. (See V.A.T.S. Election Code, art. 13.03) Therefore, the question raised concerning Petitioner's right to vote in said election is not moot because said election has not yet been completed, and there is yet to be selected the Republican nominee for the office of the United States Senator from Texas.

Petitioner in his Petition for Writ of Mandamus referred to the primary election to be held on May 2, because when such Petition was filed, Petitioner had no way of determining whether such election would be completed on that date or on June 6. Since it is to be completed on June 6, 1964, the question presented has not become moot.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Texas in *Sergeant Herbert N. Carrington vs. Alan V. Rash, et al.* In the event that the Petition is granted, Petitioner prays that

the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to issue the Writ of Mandamus as prayed for in the Petition.

Respectfully submitted,

W. C. PETICOLAS
PETICOLAS, LUSCOMBE & STEPHENS
12E El Paso National Bank Bldg.
El Paso 1, Texas
Attorneys for Petitioner

APPENDIX A

IN THE SUPREME COURT OF TEXAS
No. A-10104

SERGEANT HERBERT N. CARRINGTON,
Relator,

v.

ALAN V. RASH ET AL.,
Respondents.

ORIGINAL MANDAMUS PROCEEDING

This proceeding presents for decision the question of whether a nonresident at the time of entering the regular military service of the United States can acquire a voting residence in Texas so long as he is in the military service. We hold that he may not.

Realtor, Herbert N. Carrington, is a sergeant in the United States Army. He entered the military service in 1946, at which time he was a resident of Alabama. He has been stationed at White Sands, New Mexico, and has resided in El Paso County, Texas, since February, 1962. He has purchased a home in El Paso, pays taxes in El Paso, registers his automobile in El Paso, and has purchased a poll tax in El Paso. He says that El Paso County is his legal residence, and we assume that such is the case.

Relator desires to vote in the Republican Party Primary Election to be held on May 2, 1964. Respondent, Alan V. Rash, is Chairman of the Republican Party Ex-

ecutive Committee of El Paso County and the Respondent, Margaret Hockenberry is the Presiding Judge of the precinct in which Relator would vote. These Respondents have informed Relator that he will not be permitted to vote because of the opinion of the Attorney General of Texas, dated November 6, 1963, holding that a former non-resident in the position of Relator may not vote in Texas.

Prior to 1954, and for over a hundred and twenty years, the Constitution of Texas disqualified members of the regular military establishments of the United States from voting in this state. This included both native residents and former non-residents. Pursuant to proper legislative action, there was submitted in 1954, and adopted by a vote of the people, an amendment to Suffrage Article VI of the Constitution of Texas. As relevant here, this amendment for the first time enfranchised members of the regular military forces of the United States to the following extent:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military services of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The self-evident purpose of the amendment to the Constitution was to prevent a person entering military service as a resident citizen of a county in Texas from acquiring a different voting residence in Texas during the period of his military service, and to prevent a person entering military service as a resident citizen of another state from acquiring a voting residence in Texas during the period of military service. Relator argues that the intent of the 1954 amendment was to enfran-

chise all members of the Armed Forces but to restrict only the voting residence of those individuals entering the military service from Texas to the county of their residence; in other words, says Relator, a former non-resident may choose and change his voting residence in Texas, a privilege denied to original residents of Texas. We do not regard this as a reasonable or plausible construction of the amendent. To so narrowly construe the amendment would be inconsistent with the history of the provisions of the Texas Constitution with respect to the exercise of suffrage by persons in military service. As before mentioned, no member of the regular military establishments could vote in Texas prior to the 1954 amendent, and it is not reasonable to say that the Legislature in submitting the amendment, and the people in their favorable vote thereon, intended to free from all restrictions based on military service those persons who had entered such service as residents of another state, but to restrict those persons entering military service as residents of Texas to the right to vote in the county in which they resided at such time. Such a construction would, in effect, create a discrimination against residents of the state. Moreover, the very purpose of the disfranchisement of military personnel for so long, and the obvious purpose of restricting the vote of a Texas resident to the county in which he resided at the time he entered the military service, was to prevent a concentration of military voting strength in areas where military bases are located. This basic purpose and policy would be frustrated if individuals in the military service who were former residents of another state could choose and change their voting residence while stationed in Texas.

Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence. They are residents in a particular place for a

particular period of time under compulsion of military orders; they do not elect to be where they are. Their reasons for being where they are, and their interest in the political life of where they are, cannot be the same as the permanent residents. This is not to say that military personnel are any less citizens; it is to say that military personnel in the nature of their sojourn at a particular place are not, and cannot be, a part of the local community in the same sense as its permanent residents. Denying to such personnel the right of suffrage in the place where they may be stationed—while in no sense denying the exercise of such right in their place of original residence — is not unreasonable and the classification established is nondiscriminatory. The voting restrictions operate alike upon all members of the class. Both the original resident and former nonresident lose the right to vote in Texas upon a change in their legal residence after entering the military service. The nonresident voluntarily gives up his right to vote in his original state of residence by changing his legal residence to Texas. The resident voluntarily gives up his right to vote by changing his legal residence to another county in Texas.

This is not to say that the Texas Constitution purports to, or can, restrict the voting rights of persons in other states. Texas cannot, of course, extraterritorily regulate or limit the voting residence of a person entering the military service as a resident of another state so long as such person remains a citizen of the other state. The Texas Constitution can, however, declare the policy that the enfranchisement of a person in military service shall be limited to the exercise of suffrage in the county in which the person resided at the time of entering the the service. The effect on former nonresidents is that they may not acquire a voting residence in Texas; the

the effect upon original residents is that they may not change their voting residence from one county to another.

This construction does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in its provision that no state shall deny to any person within its jurisdiction the equal protection of the laws. Involved is the question of the reasonableness of the classification; or, to express it otherwise, there is involved the question of whether the 1954 amendment as so construed results in a discrimination which offends the Federal Constitution. The Supreme Court of the United States has long recognized that "the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution. . . . *A State, so far as the Federal Constitution is concerned, may provide by its own Constitution and laws that none but native-born citizens shall be permitted to vote*, as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated. . . ." (Italics are added) Pope v. Williams, 193 U. S. 621, 632, 633, 24 S. Ct. 573, 4 L. Ed. 817. The case involved a Maryland statute which provided that a nonresident coming into the state to reside must have filed a declaration of intent so to do a year before he should have the right to be registered as a voter in the state. The statute was unsuccessfully attacked as violating a federal right of the new resident of Maryland.

Later, in 1959, The United States Supreme Court reaffirmed the foregoing principles, saying:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, . . . absent of course the discrimination which the Constitution condemns. . . . So while the right to suffrage is established and guaranteed by the Constitution . . . it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. . . . We do not suggest that any standards which a state desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction." Lassiter v. North Hampton Board of Elections, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072.

The Supreme Court in this case sustained a statute of North Carolina which required that prospective voters be able to read and write in the English language any section of the Constitution of the state.

In Gray v. Sanders, 373 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 [holding that the Georgia county unit system violated the equal protection clause of the Fourteenth Amendment] the Court reaffirmed the principle that "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

We do not believe that a resident of another state upon entering the military service possesses a "federally protected right" to vote in Texas elections while in the military service in whatever county or district in Texas to which he may elect to change his voting residence.

The provision of the Texas Constitution under review does not result in the loss of the right of the nonresident to retain his voting privileges under the laws of the state of his residence when he entered the service; its effect is only that a resident of another state entering military service cannot later give up his former residence, and with it the right to vote in such state, and thereupon, while in the military service, acquire a voting residence in Texas.

The petition for writ of mandamus is denied.

Zollie Steakley
Associate Justice

Chief Justice Calvert and Associate Justice Smith dissenting.

Opinion delivered
April 29, 1964.

IN THE SUPREME COURT OF TEXAS

NO. A-10104

SERGEANT HERBERT N. CARRINGTON Relator v. ALAN V. RASH ET AL. Respondents	Original Petition For Mandamus

DISSENTING OPINION

This is an original petition for writ of mandamus filed by Relator, Herbert N. Carrington, to compel respondents to determine whether or not Relator is a qualified elector for the purpose of voting in the Republican party primary to be held on May 2, 1964, without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama. Respondents in this proceeding are Honorable Waggoner Carr, Attorney General of Texas; Honorable Alan V. Rash, Chairman of the Republican party Executive Committee of El Paso County, Texas, and Honorable Margaret Hockenberry, the "presiding judge' who will conduct the Republican party primary election in Precinct No. 16 of El Paso County, Texas.

Relator is a Sergeant in the United States Army. He entered the service in 1946, when he was a resident of Jefferson County, Alabama, and has been continuously in the military service since that time. It is undisputed that Relator is at present a resident of El Paso County, Texas, where he and his family have resided since

February, 1962. He has designated El Paso, Texas, as his permanent home for all purposes on his military records, has paid ad valorem taxes and will pay such taxes in the future to the City of El Paso and to the County of El Paso, and has shown on his federal income tax return that he resides in El Paso, Texas.

On December 17, 1963, Relator paid the poll tax levied for the year 1963 to the County Tax Collector of El Paso County, Texas. Thereafter, on March 18, 1964, Relator wrote a letter to Respondent Rash, asking whether or not Relator would be allowed to vote in the Republican party primary election to be held in May 2, 1964. Respondent Rash, in his capacity as Chairman of the Republican party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, as "presiding judge" of Precinct No. 16, answered by letter that:

> "Mrs. Margaret Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified voter. We have taken this position because he is in the United States Army and he resided outside of the State of Texas at the time he entered military service."

In 1954 the following amendment was added to Article VI, Section 2, Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Articles 5.01 and 5.02 of the Texas Election Code restate, in effect the law as contained in the above amendment.

Prior to Relator's correspondence with the Respondents, Rash and Hockenberry, the Respondent Attorney

General, in an opinion, had interpreted the above amendment and its statutory counterparts. In interpreting these provisions, the Attorney General's opinion stated in part:

> ". . . It goes without saying that the Texas Contitution cannot regulate voting rights of persons at any place other than within the State of Texas, and can not affect the voting rights of residents of other States while stationed in Texas. This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering service, and if at that time he did not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that no person who entered service as a resident of another state may acquire a voting residence in Texas while he is in service."

Based on this opinion, Respondents Rash and Hockenberry refused to recognize Relator as a qualified voter.

Relator first contends that the Attorney General's interpretation of the above-quoted Constitutional provision is incorrect. It is Relator's position that the provision was not intended to apply to members of the Armed Forces who were *not* residents of the State of Texas at the time they entered the military service, but who are now residents of Texas. Instead, Relator contends that the Constitutional amendment was intended to apply only to servicemen who resided in Texas when they entered the service.

Relator next argues that if the Constitutional amendment in question does apply to persons who resided in

Texas and those who resided elsewhere at the time of entering service, then the amendment constitutes an unlawful discrimination *within the class* of military personnel; and, therefore, violates the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution. Relator bases this argument upon the theory that the Constitutional amendment, if applied to all military personnel, discriminates against those servicemen who were *not* residents of Texas at the time of entering the service. To illustrate this alleged discrimination, Relator argues that a serviceman such as himself, who enters the Armed Forces in another state, and thereafter establishes his residence in Texas, is deprived of the right to become a qualified voter in any election so long as he resides in Texas and remains a member of the Armed Forces. This is so because when he acquires a new residence in Texas, he loses his voting privilege at the place where he resided when he entered service, and he cannot meet the residence requirements of Texas. Therefore, he is left without a place to vote. On the other hand, Relator argues that the Constitutional provision in question does not so deprive a serviceman, who was a resident of Texas at the time he entered the Armed Forces, of his right to vote. According to Relator, a serviceman who resides in Harris County, Texas, at the time he enters the Armed Forces, and who thereafter changes his legal residence to El Paso County, Texas, can still remain a qualified voter in Harris County. Thus, Relator concludes the Constitutional provision unlawfully discriminates within the class of military personnel.

Respondents argue that the provision in Article VI, Section 2, of the Texas Constitution was intended to apply to persons who were not residents of Texas at the time of entering service, *and* to persons who were

Texas residents. Respondents further contend that this provision does not violate the Fourteenth Amendment of the United States Constitution because *regardless of* where a serviceman resided at the time of entering service, if he changes his legal residence while in service in Texas, he relinquishes his right to vote anywhere.

In my opinion, a determination of this proceeding does not rest upon whether or not the Constitutional provision under attack unlawfully discriminates *within* the class of military personnel, as contended by Relator. Even assuming that it does not, as Respondents so argue, this still does not settle the ultimate constitutional problem as to whether a state may segregate *all* persons in military service as a class, which class is to be treated differently from other persons in regard to the right to vote. In my opinion, such a distinction is arbitrary and unreasonable, thereby violating the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

I fully recognize that the Federal Constitution, or any of its amendments, does not give to a person the privilege to vote in any state. See Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627. It is clear that the privilege to vote in a state is within the jurisdiction of the state itself, "to be exercised as the state may direct. . . ." Pope v. Williams, 193 U. S. 621 (1904). In fact, the Federal Constitution makes voters' qualifications rest on state law even in federal elections. Art. 1, §2. However, in exercising its broad powers to determine the conditions under which the right to suffrage may be exercised, the state cannot impose standards which the United States Constitution condemns as discriminatory. See Lassiter v. Northampton County Board of Elections, 360 U. S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072.

It is elementary that "class legislation" is invalid where the classification is arbitrary and unreasonable. The classification must rest on real and substantial differences and must reasonably promote some proper object of public welfare or interest. Thus, without contravening any restriction that Congress has imposed, a state can determine that only those persons who are literate should vote since "[t] he ability to read and write . . . has *some relation* to standards designed to promote intelligent use of the ballot." Lassiter v. Northampton County Bd. of El., supra.

In the present case Respondents contend that the purpose of the Constitutional amnedment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to complete domination and control of local politics by military men to the prejudice of the civilian citizens of the community. In my opinion this is not a reasonable ground upon which the State can say that there exists a real and substantial difference between servicemen and other citizens, and thereby confer different voting rights on these classes.

With present day mobility and industralization, large groups, *other than servicemen*, move into the various communities of this state for limited stays, and establish voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact.

Wherein lies the reasonable basis for distinguishing between these groups?

In the recent case of Gray v. Sanders, 372 U. S. 368, 9 L. Ed. 2d 821, 8 S. Ct. 801 (1963), our Supreme Court has said:

> " . . . there is no indication in the Constitution that homesite or *occupation* affords a permissable basis for distinguishing between qualified voters within a state. . . . " (Emphasis added.)
>
> " . . . Once the geographical unit for which a representative is to be chosen is designated, all who participatein the election are to have an equal vote — whatever their race, whatever their sex, *whatever their occupation*, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those *who meet the basic qualifications* . . ." (Emphasis added.)

In the present case, Relator has proven to the satisfaction of Respondent that he meets the basic qualifications of holding a valid poll tax receipt, and that he meets all of the age and residence requirements for a qualified elector in El Paso County, Texas. The Respondents do not contend that Relator is unqualified to vote because he is immature, or is of unsound mind, or is a criminal or a public charge. Instead, by Respondent's own admission, Relator is unqualified *solely* because he is a member of the Armed Forces, who resides in Texas. Such a "distinction" does not fulfill the test of reasonableness of classification as required by the Fourteenth Amendment of the United States Constitution. Moreover, the considerations which are recited in the majority opinion as affording a sound basis for denying the right to vote to members of the Armed Forces apply only to local elections; but the effect of the majority opinion is to deny the right to vote in *all* elections, even in the election of a President of the United States.

Inasmuch as Article VI, Section 2 of the Texas Constitution violates the equal protection clause of Sec-

tion 1 of the Fourteenth Amendment of the Constitution of the United States, Relator's petition for writ of mandamus should be granted.

Opinion delivered: April 29, 1964
Chief Justice Calvert joins in this dissent.

Clyde E. Smith
Associate Justice

APPENDIX B

IN THE SUPREME COURT OF TEXAS

No. A-10104.

Sergeant Herbert N. Carrington

vs.

Alan V. Rash et al.

April 29, 1964.

Original Mandamus.

This cause came on to be heard on petition of relator, Sergeant Herbert N. Carrington, for writ of mandamus, filed herein on April 15, 1964, and said petition, together with the record and briefs and argument of counsel, having been duly considered, because it is the opinion of the Court (Chief Justice Calvert and Associate Justice Smith dissenting) that the writ of mandamus as prayed for should not issue, it is therefore adjudged, ordered and decreed that the petition for writ of mandamus be, and hereby is, in all things denied.

It is further ordered that relator, Sergeant Herbert N. Carrington, pay all costs incurred in this proceeding in this Court.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above judgment is a true and correct copy of the judgment of the Supreme

Court of Texas in the case of Sergeant Herbert N. Carrington vs. Alam V. Rash et al., No. A-10104, Original Mandamus, as such judgment appears of record in the minutes of said Court under the date of April 29, 1964.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 5th day of May, 1964.
(SEAL)

GEO. H. TEMPLIN, CLERK

By EUGENE CERVENKA, Deputy.
Eugene Cervenka

No. 82

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

SERGEANT HERBERT N. CARRINGTON,
Petitioner

V.

ALAN V. RASH, ET AL.,
Respondents

**MOTION UNDER RULE 43 (4)
FOR EXPEDITIOUS TREATMENT**

W. C. PETICOLAS
PETICOLAS, LUSCOMBE & STEPHENS
12E El Paso National Bank Bldg.
El Paso 1, Texas
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

SERGEANT HERBERT N. CARRINGTON,
Petitioner

v.

ALAN V. RASH, ET AL.,
Respondents

MOTION UNDER RULE 43 (4) FOR EXPEDITIOUS TREATMENT

Petitioner will be denied the right to participate in electing the Texas Republican Party nominee for United States Senate unless the Court acts with a promptness not necessary in most cases. The Republican Party general primary election for the State of Texas was held on May 2, 1964, and the second primary election which is necessary in the United States Senatorial race will be held on June 6, 1964. Under the admitted facts of this case, Petitioner will be denied the right to vote in said election unless the relief prayed for in this cause is

granted prior to such date. Also, the final duties of Respondents Rash and Hockenberry in determining whether or not Petitioner is a qualified voter will be executed on that date. It is requested, therefore, that Respondents be directed to reply in opposition to this Petition for Writ of Certiorari and on the merits, within 5 days, or within any reasonable time that the Court may wish to set which will allow the Court to rule on the merits of the case prior to June 6, 1964. We are willing to waive further briefs and argument and are also prepared to meet any time schedule as to either that suits the Court's convenience.

Respectfully submitted,

W. C. PETICOLAS
PETICOLAS, LUSCOMBE & STEPHENS
12E El Paso National Bank Bldg.
El Paso 1, Texas
Attorneys for Petitioner

No. 82

IN THE

Supreme Court of the United States

October Term, 1964

SERGEANT HERBERT N. CARRINGTON,
Petitioner

v.

ALAN V. RASH, ET AL.,
Respondents

BRIEF OF RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF THE STATE OF TEXAS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WAGGONER CARR
Attorney General of Texas

MARY K. WALL
Assistant Attorney General
of Texas

P. O. Drawer R
Capitol Station
Austin, Texas 78711
Attorneys for Respondent.

SUBJECT INDEX

CITATIONS

Cases

CITATIONS—Continued

No. 1108

IN THE

Supreme Court of the United States

October Term, 1963

SERGEANT HERBERT N. CARRINGTON,
Petitioner

v.

ALAN V. RASH, ET AL.,
Respondents

BRIEF OF RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF THE STATE OF TEXAS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Waggoner Carr, Attorney General of the State of Texas, opposes the granting of the petition for writ of certiorari because the Supreme Court of Texas has correctly decided the question raised by the petition and no substantial federal question is presented.

STATEMENT OF THE CASE

In addition to the statement appearing in the petition, the following information will assist in a proper evaluation of this case.

The provision in Article VI, Section 2 of the Constitution of Texas which limits voting by persons in military service to the county of residence at the time of entering service was added by an amendment which became effective on November 19, 1954. This is the first case decided by any court above the district court which rules on any question connected with that provision. The only other decided case is one by a state district court (*Mabry v. Davis,* No. F-158882, in the 45th District Court of Bexar County, Texas), in which the court on January 28, 1964, denied relief to the plaintiff, a person in military service in essentially the same status as Petitioner in the present case, who sought to compel the County Tax Assessor-Collector of Bexar County to remove the notation "Not eligible to vote" from the poll tax receipt issued to him. Another case, brought by the same plaintiff and another against the County Tax Assessor-Collector and the Attorney General of Texas, was filed in the United States District Court for the Western District of Texas on March 23, 1964, alleging violation of Article I, Sections 2 and 4 of the United States Constitution and of Sections 1 and 2 of the Fourteenth Amendment (*Mabry et al. v. Davis et al.,* Civil Action No. 3395—San Antonio). It is set for trial before a three-judge court during the week of July 13, 1964.

Within less than a month after the effective date of the 1954 Amendment, the Attorney General of Texas rendered an opinion construing its provisions. This opinion, numbered S-148 and rendered on December 18, 1954, was reaffirmed in Opinion C-173, rendered on November 6, 1963, to the County Attorney of El Paso County, Texas. According to the statement of Respondent Rash in a letter to Petitioner's attorney on March 23, 1964 (attached as Exhibit "C" to the petition for writ of mandamus in the Supreme Court of Texas), it

was this latter opinion which led him and Respondent Hockenberry to refuse to permit Petitioner to vote. These two opinions are reproduced in an appendix to this brief. They are in harmony with the majority opinion rendered by the Supreme Court of Texas in this cause. They were the most authoritative interpretation of the law in existence prior to the 1964 court decisions, and hence it may be said that at the time Petitioner voluntarily chose to become a legal resident of Texas, he had full notice of the construction of the Texas law and of the effect which his choice would have on his voting rights.

In the Supreme Court of Texas, Petitioner contended that the Attorney General's opinions had misconstrued the Texas law in holding that it applied to persons who entered military service as residents of some State other than Texas. The Supreme Court held against him on that point. That construction is binding in this Court, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 99 (1952), and the point was not brought forward.

The Supreme Court of Texas also interpreted the purpose of the restriction in the Texas law as being "to prevent a concentration of military voting strength in areas where military bases are located." This interpretation is likewise binding on the federal courts, irrespective of the nature of the evidence upon which the state court based its finding. We might state, however, that the Court had before it ample evidence for this finding, in the form of declarations by the sponsor of the Amendment in the Texas Legislature and other documentary evidence showing that the Legislature intended this to be the purpose when it proposed the Amendment and that the people so understood its purpose when they adopted it. This evidence was presented

without objection from Petitioner in the brief filed in that Court by Respondent Carr.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

A. Reasonableness of the Classification

Petitioner contends that the Texas law limiting voting by persons in military service to the county of residence at the time of entering service violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The rule for testing validity of state action under the equal protection clause is summed up in the following quotation from *McGowan v. State of Maryland,* 366 U.S. 420, 425 (1960):

> "* * * Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The question, then, is whether the classification is reasonable: do persons in military service constitute a class which may properly be treated differently from other persons? The burden is on Petitioner to prove its unreasonableness. *Madden v. Commonwealth of Kentucky,* 399 U.S. 83, 88 (1940).

This action was brought as an original mandamus proceeding in the Supreme Court of Texas. That Court

does not hear evidence, and jurisdiction in original proceedings is entertained only when there are no disputed fact issues involved in the case. In these circumstances, Petitioner did not have an opportunity to "prove" the unreasonableness of the classification by producing evidence to show, for example, that there is no existing military installation where the number of military personnel assigned to it outnumbers the civilian population in the immediate area and no likelihood that such an installation will exist in the future; or that there is no likelihood that a military commander might seek to control local affairs and no possibility that he could influence the vote of the persons under his command; that persons in military service, in their relation to the interests, needs and aims of the communities where they are stationed, have attitudes and outlooks no different from those of the civilian population, or that within the class they have differences of viewpoints just as the civilians do, and in relatively corresponding proportions; or that, granting that by and large the military population is likely to think and feel differently from the civilians toward local matters, the difference is innocuous and could not have a harmful effect on local affairs.

Petitioner makes a plea of inequity by cataloging the facts in his individual case. He has been in service for almost 20 years and is already looking to the time when he will retire. He and his family have chosen El Paso as the place where they will "settle down," and they are already putting down roots to become permanently a part of the community life where they now live.

Is this typical of persons in military service? What percentage of the men who are stationed at the White Sands installation where he serves have similar pur-

pose? Is it usual among military personnel generally that most of them intend to remain permanently at the place where they are stationed, and could they do so even if they so desired? Common knowledge bears witness to the contrary. The record is silent as to where Sergeant Carrington served during the years from 1946 to 1962. If it happens that he served some of that time at or near some other location in Texas, or if it had so happened, could he have made the same claim with respect to that place?

Petitioner's present situation may make a strong appeal as to the injustice of denying him the privilege of voting at the place where he intends to remain permanently. The equities in his case may be different from the average military man, but he is still a member of the class. The reasonableness of the classification is not to be tested by the isolated example. *Lindsley v. Natural Carbonic Gas Company*, 220 U.S. 61, 78 (1911); *Spahos v. Mayor & Councilmen of Savannah Beach, Ga.*, 207 F.Supp. 688, 692 (S.D. Ga. 1962), affirmed 371 U.S. 206.

Respondent submits that Petitioner could not have proved that the classification is unreasonable, even if he had had an opportunity to do so. Facts of common knowledge, of which the courts may take judicial notice, adequately demonstrate that there is a reasonable and substantial basis for distinction. In any event, the circumstance that Petitioner in the present action did not have an opportunity to make proof of unreasonableness because of the forum he chose for bringing the action does not relieve him of the burden.

The majority of the Supreme Court of Texas found a reasonable basis for treatment of persons in military service, saying:

"Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence. They are residents in a particular place for a particular period of time under compulsion of military orders; they do not elect to be where they are. Their reasons for being where they are, and their interest in the political life of where they are, cannot be the same as the permanent residents. This is not to say that military personnel are any less citizens; it is to say that military personnel in the nature of their sojourn at a particular place are not, and cannot be, a part of the local community in the same sense as its permanent residents. Denying to such personnel the right of suffrage in the place where they may be stationed—while in no sense denying the exercise of such right in their place of original residence—is not unreasonable and the classification established is nondiscriminatory. The voting restrictions operate alike upon all members of the class." (Appendix, Petition for Writ of Certiorari, p. 3a.)

The power of each State to determine who shall constitute its electorate, subject only to specific restrictions in the United States Constitution, has been confirmed by this Court many times. It was stated in *Pope v. Williams,* 193 U.S. 621, 632 (1904), and in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 50 (1959), cited in the majority opinion of the Supreme Court of Texas. It was reiterated most recently in *Gray v. Sanders,* 372 U.S. 368, 379 (1963). The Texas law clearly falls within the State's power to prescribe qualifications and conditions for voting.

Petitioner relies on *Gray v. Sanders* as supporting his contention. As we understand that case, it dealt solely with the weight to be given to the vote of a qualified elector, and the power of the State of Georgia to give the vote of one of its qualified electors greater effect than that of another. It had nothing to do with

the State's power to determine who are its qualified electors. In this connection, it is interesting to note that the Constitution of Georgia contains a provision which apparently has the same effect as the Texas law, at least in some circumstances. Section 2-702 of the Georgia Constitution reads:

> "Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: *Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.*" (Emphasis supplied.)

The annotated edition of the Georgia Statutes available to us does not show any annotations of decisions construing the proviso, and we are not informed on how it has been construed administratively. While usually not prohibiting acquisition of residence under all circumstances, it is not unusual for state constitutions and statutes to restrict in some manner the power of an individual in military service to acquire residence at the place where he is stationed. We submit that a State could deny to persons in military service the power to acquire a domicile within the State while serving under orders which made them subject to reassignment at any time. But Texas does not go that far. She permits the person in military service to become a legal resident for all purposes except voting, thereby being able to escape the burdens which might have been imposed on him by the State of his former residence (e.g., state income tax) and to acquire privileges for himself or members of his family which the State of Texas accords to its residents (e.g., the privi-

lege of attending state-supported colleges on resident tuition charges). The fact that Texas allows a person, present within this State under circumstances which ordinarily would not vest him with the status of a resident, to acquire that status by the exercise of his free choice, should not prevent the State from restricting and regulating the privileges accompanying a residence so acquired.

In the Supreme Court of Texas, the only ground of invalidity alleged by Petitioner was violation of the equal protection clause of the Fourteenth Amendment. Apparently that also is the only ground urged in this Court, but the argument on pages 8 and 9 of the petition for writ of certiorari take on overtones of the privileges and immunities clause. Inapplicability of that provision to abridgment of suffrage was settled in *Minor v. Happersett*, 21 Wall. 162 (1875), which held that a state law withholding suffrage from women did not violate the privileges and immunities clause of the Fourteenth Amendment. The fact that amendment of the Constitution was deemed necessary to secure voting rights for women confirms that denial of suffrage to women likewise did not violate the equal protection clause. (It seems apparent to the writer of this brief that with respect to voting rights and privileges there is far more substantial basis for classifying the military separately from the civilian citizens than for classifying the female separately from the male citizens; and that the history of "woman suffrage" and the Nineteenth Amendment furnishes the answer to Petitioner's contention.)

Even assuming that every adult citizen of the United States has a right to vote, Petitioner voluntarily relinquished that right upon his choice to become a resident of Texas. The following statement is made on page 9 of the petition:

"* * * [T]here are no facts in this case which indicate that Petitioner voluntarily gave up his right to vote in his original state of residence. Under the facts of this case, since Petitioner was only 18 years of age when he entered the service, it is most likely that he never had an opportunity to acquire a voting residence in any state before moving to Texas."

Every State and Territory of the United States permits its residents to maintain residence during absence in military service, and if a resident is a qualified elector under the laws of the State, he may vote in its elections. Indeed, every State and Territory except Puerto Rico has laws providing for absentee voting by persons absent in military service. See *Voting Information 1964,* Pamphlet DoD Gen-6, published 12 December 1963 by Armed Forces Information and Education, U. S. Department of Defense, Washington, D. C.

Petitioner entered military service as a resident of Alabama. The pertinent provisions of the Alabama law are contained in Title 17, Sections 17 and 64(16) of the Code of Alabama 1940 (Recompiled 1958), which read:

"§ 17. *Residence not acquired or lost by temporary absence.*—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."

"§ 64(16). *'Absentee voter' defined; qualified ab-*

sentee voters' list; method of voting; delivery of absentee ballots.—(a) Any qualified elector of this state who is in service as a member of the armed forces of the United States, whose regular duty requires that he be absent from the county of his residence on the date any primary, general, special, or municipal election is to be held, and any qualified elector who is the wife of any such elector in service who resides with him at his duty station, or any qualified elector who is a disabled veteran confined in a facility or hospital operated by the veterans administration, may vote in the election in the manner and under the regulations hereinafter prescribed. * * *"

Alabama law requires that a person be 21 years old in order to vote. Although Petitioner was not a qualified voter at the time he entered service, as a resident of the State he would have acquired the right to vote in Alabama three years later upon reaching majority.

The facts alleged in this case are that Petitioner entered service at 18 years of age as a resident of Alabama. At that time his residence (domicile) was fixed by that of his parents. The allegations do not expressly negative the possibility that Petitioner's legal residence had been changed by the removal of his parents to some other place before he became 21 years old, or that after becoming 21 years old he had voluntarily established a legal residence at some other place. We assume that he had not; in any event he had a domicile at some place, and he could have continued to maintain it at that place so long as he remained in service, if he had wished to do so. His relinquishment of residence and concomitant voting privileges was by his own choice, with notice of the consequences when he chose to become a resident of Texas.

B. Contemporaneous Construction of the Fourteenth Amendment as Applied to Restrictions on Voting by Persons in Military Service

From 1837, when Texas was a newly-founded republic, until amendment of the State Constitution in 1954, the laws of Texas disfranchised part or all of its residents who were in military service. If total denial of voting privileges did not violate the Fourteenth Amendment, it would necessarily follow that the present restriction also is not invalid on that ground. The purpose of this section of our brief is to show that the Congress of the United States in 1870 interpreted this complete disfranchisement as not violating the Fourteenth Amendment; that this contemporaneous construction would be entitled to great persuasive weight in a determination of its validity; and that validity of the former provision would encompass validity of the present restriction on place of voting.

The Fourteenth Amendment was proposed to the legislatures of the several States on June 16, 1866, and proclamation of its ratification was issued on July 28, 1868. On November 30, 1869, the people of Texas ratified a new constitution which had been proposed by a constitutional convention convened under the Reconstruction Acts of Congress passed March 2, 1867 and Acts supplemental thereto, with the express view of seeking readmission to the Union. This Constitution of 1869 contained the following provisions under Article III, entitled Legislative Department:

> "Section 1. Every male person who shall have attained the age of twenty-one years, and who shall be (or who shall have declared his intention to become) a citizen of the United States, or who is, at the time of the acceptance of this Constitution by the Congress of the United States, a citizen of Texas, and shall have resided in this State one

year next preceding an election, and the last six months within the district or county in which he offers to vote, and is duly registered (Indians not taxed excepted) shall be deemed a qualified elector; and should such qualified elector happen to be in any other county, situated in the district in which he resides, at the time of an election, he shall be permitted to vote for any district officer: Provided, that the qualified electors shall be permitted to vote anywhere in the State for State officers; And provided further, that *no soldier, seaman, or marine, in the army or navy of the United States, shall be entitled to vote at any election created by this Constitution.*" (Emphasis supplied.)

Section 1 of Article VI, entitled Right of Suffrage, read:

"Section 1. Every male citizen of the United States, of the age of twenty-one years and upwards, *not laboring under the disabilities named in this Constitution,* without distinction of race, color, or former condition, who shall be a resident of the State at the time of the adoption of this Constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote sixty days next preceding an election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the electors at any election; Provided, that no person shall be allowed to vote, or hold office, who is now, or hereafter may be, disqualified therefor, by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States: Provided further, that no person, while kept in any asylum, or confined in prison, or who has been convicted of a felony, or who is of unsound mind, shall be allowed to vote or hold office." (Emphasis supplied.)

Texas was readmitted to the Union by an Act of Con-

gress approved March 30, 1870 (16 Stat. 80). The preamble of this Act read:

> "Whereas, The people of Texas have framed and adopted a constitution of State government which is republican; and whereas the Legislature of Texas, elected under said constitution, has ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith is a condition precedent to the representation of the State in Congress: Therefore, Be it enacted * * *"

The Act contained the following proviso:

> "* * * And provided further, That the State of Texas is admitted to representation in Congress as one of the States of the Union, upon the following fundamental conditions: First, That the Constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: Provided, That any alteration of said constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. * * *."

The provisos inserted in the Texas Readmission Act and in the Acts readmitting other States make it clear that Congress scrutinized with great care the constitutions under which the States were readmitted. 15 Stat. 73, 74, 16 Stat. 59, 60 (Georgia); 16 Stat. 62, 63 (Virginia); 16 Stat. 67, 68 (Mississippi). Moreover, Section 5 of the Fourteenth Amendment gives the Congress the power to enforce that Article of Amendment by appropriate legislation. Disfranchisement of mili-

tary personnel by the Texas Constitution continued until 1954, and there was at least one other State which disfranchised members of the regular military establishments for a long period of time.[1] Yet in all those years there was never an act of Congress outlawing the disfranchisement, and so far as we have been able to find there was never a court decision declaring it to be invalid.

The failure of the Congress which readmitted Texas to insist upon deletion of the provision in Article III, Section 1 which disfranchised soldiers, seamen and marines can only be taken as a construction by the Congress that this provision did not offend the Fourteenth Amendment. It is a settled rule that the contemporaneous and practical construction of constitutional provisions by the legislative branch, in the enactment of laws, has great weight and gives rise to a strong presumption that the construction rightly interprets the meaning of the provisions. *Williams v. United States,* 289 U.S. 553, 573 (1933); *Ex parte Quirin,* 317 U.S. 1, 41 (1942).

We have, then, a contemporaneous construction by the Congress of the United States, the body entrusted with power to enforce the mandates of the Fourteenth Amendment, that the former provision of the Texas Constitution completely disfranchising persons in military service did not violate that Amendment. If their

[1]Until amended in 1920, Article VII, Section 3 of the Nebraska Constitution of 1875 (now Art. VI, Sec. 3) read: "Every elector in the military or naval service of the United States or of this state, and not in the regular army, may exercise the right of suffrage at such place and under such regulations as may be provided by law." This provision was taken as not permitting anyone in the "permanent military establishment, which is maintained both in peace and war" to vote in Nebraska. *State v. Moorhead,* 102 Neb. 76, 167 N.W. 70 (1918); 29 C.J.S., Elections, § 16, p. 37.

complete disfranchisement is not proscribed, then clearly the present restriction also does not offend its terms.

WHETHER THE QUESTION IS MOOT

Petitioner has suggested that the Attorney General might contend that this case has become moot, because the election for which Petitioner sought a writ of mandamus has already been held. On the authority of *Gray v. Sanders*, 372 U.S. 368 (1963), Respondent feels that this Court does not consider the case to be moot, since the provision under attack, as construed by the Supreme Court of Texas, would continue to govern future elections at which Petitioner would be entitled to vote if the provision is invalid.

CONCLUSION

Respondent asks that the petition for writ of certiorari be denied, because the question raised in the petition was correctly decided in the Supreme Court of Texas and no substantial federal question is presented in this Court.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

MARY K. WALL
Assistant Attorney General
of Texas

P. O. Drawer R
Capitol Station
Austin, Texas 78711

Attorneys for Respondent.

PROOF OF SERVICE

I, MARY K. WALL, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of June, 1964, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on W. C. PETICOLAS, attorney for Petitioner, by mailing a copy in a duly addressed envelope, with first air mail postage prepaid, at the address of 12E El Paso National Bank Bldg., El Paso 1, Texas.

MARY K. WALL

APPENDIX

OPINIONS OF THE ATTORNEY GENERAL OF TEXAS CONSTRUING THE TEXAS LAW ON PLACE OF VOTING BY PERSONS IN MILITARY SERVICE

1. Opinion No. S-148, rendered December 18, 1954.

Hon. Robert S. Calvert
Comptroller of Public Accounts
Austin, Texas

Opinion No. S-148

Re: Construction of constitutional amendment adopted November 2, 1954, concerning voting by members of the armed forces.

Dear Mr. Calvert:

You have requested an opinion relating to the construction and effect of the constitutional amendment adopted November 2, 1954, amending Sections 1 and 2 and repealing Section 2a of Article VI, Constitution of Texas, concerning voting by members of the armed forces. Your questions are as follows:

> "1. What is the effective date of the Constitutional Amendment voted upon at the General Election on November 2, 1954, which repeals Section 2a of Article VI and amends Sections 1 and 2 of Article VI of the Texas Constitution?
>
> "2. Does this amendment make any distinction between members of the regular military establishment of the United States and officers or enlisted men of the National Guard of Texas, the National Guard Reserve, the Officers Reserve Corps of the United States, or draftees?
>
> "3. If your answer to the second question is in the negative, will it be necessary for any member of the Armed Forces of the United States or com-

ponent branches thereof, or in the military service of the United States, to pay his or her poll tax in the county in which he or she resided at the time of entering such service, so long as he or she is a member of the Armed Forces?

"4. Do you construe Section 2 to mean that a poll tax is levied only on persons between the ages of 21 and 60; and that the State poll tax levy will still be $1.50, but that members of the National Guard will still pay the State poll tax of $1.00, as referred to in Articles 5840 and 5841?"

A constitutional amendment becomes a part of the Constitution on the date of the official canvass showing that the amendment received a majority vote. *Wilson v. State,* 15 Tex. Ct. App. 150 (1883); Att'y Gen. Op. S-146 (1954). The votes of the election held on November 2, 1954 were canvassed on November 19, 1954, and the official canvass showed that the amendment had been adopted. It therefore became effective on November 19. By its express terms, Section 2 of Article VI is self-executing. The provisions amending Section 1 and repealing Section 2a are likewise self-executing and become operative without further legislation. Att'y Gen. Op. S-146, supra. All statutes in conflict with these constitutional provisions are now superseded.

In answer to your second question, the amendment does not make any distinction between members of the regular military establishment of the United States and members of the National Guard, reservists, or draftees. Previously, the members of the regular military establishment were disfranchised, while the other groups were not. Under the new amendment, the provision in Section 1 of Article VI disqualifying members of the regular military establishment has been omitted, and no person is now disqualified as an elector

by reason of his military status. However, a provision has been added to Section 2 of Article VI which reads:

> "... Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Formerly, National Guardsmen, reservists, and draftees in active service could vote at the place of their legal residence at the time of voting (provided they had resided within the State for one year and within the county for six months) without regard to the place of residence at the time they entered service. Active members of the regular establishment could not vote at all. Now, all these groups are qualified electors if they meet other requirements, but none of them may vote anywhere in Texas except in the county where they resided when they entered service. If a person in military service changes his legal residence to some place other than the county in Texas in which he resided at the time he entered service, he cannot vote in this State.

Throughout this opinion the term "residence" means legal residence as distinguished from actual residence.

The constitutional amendment does not change the rules for determining what place is the legal residence of the voter, nor does it mean that in all circumstances a person in military service will be entitled to claim a voting residence in the county of which he was a resident at the time he entered service. Place of residence is still to be determined in the same way that it has always been. Absence from the county or State for the purpose of performing military service does not of

itself cause a loss of residence, but it is possible for a person to abandon his old residence and acquire a new residence during time of service. Tex. Const. Art. XVI, Sec. 9; *Clark v. Stubbs,* 131 S.W. 2d 663 (Tex. Civ. App. 1939); *Struble v. Struble,* 177 S.W. 2d 279 (Tex. Civ. App. 1943); *Pettaway v. Pettaway,* 177 S.W. 2d 285 (Tex. Civ. App. 1943); *Robinson v. Robinson,* 235 S.W. 2d 228 (Tex. Civ. App. 1950); 15 Tex. Jur. 715, Domicile, Sec. 6. If he does so, and thereby changes his residence to some other county, he loses his right to vote in this State while he continues in service, unless he re-establishes his residence in the county in which he resided when he entered service. Further, no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.

It is our opinion that the restriction to voting in the county of residence at the time of entering service applies only to persons who are on extended active duty. Members of the National Guard and reservists who are not on extended active service and retired military personnel are not subject to this restriction. Further, "county of residence at the time of entering such service" means the county in which the person resided at the time he began his current active service. To illustrate: A person, while residing in County A, joins one of the reserve components but does not go into active service. He later moves to County B. After he has fulfilled the length of residence requirement, he may vote in County B; in fact, he could vote nowhere else. While living in County B, he is called into active service. During this time his place of voting is in County B, the county in which he resided when he went into active service. After his release from that tour of duty, he changes his residence to County C. His place of voting is in County C so long as he continues to live

there. If he is again called into active service while living in County C, that is the place where he will vote.

Your third question concerns the payment of the poll tax by persons in military service. They are subject to payment of a poll tax to the same extent and in the same manner as all other residents of the State. Heretofore, by virtue of Section 2a of Article VI, qualified electors in military service were not required to pay the poll tax as a condition precedent to voting during time of war and for a certain period after its termination, but the recent amendment repealed this section of the Constitution. Hereafter, all persons in military service must pay a poll tax before February 1 in order to vote, unless they come within one of the exemptions. If they are exempt under the general law, they must comply with the requirements relating to obtaining exemption certificates.

If a person is subject to the poll tax, he owes it in the county of his legal residence on the first day of January preceding its levy. *Linger v. Balfour,* 149 S.W. 795, 805 (Tex. Civ. App. 1912); *McCharen v. Mead,* 275 S.W. 117 (Tex. Civ. App. 1925). It should be noted that liability to the poll tax is not limited to qualified electors. It is levied against *all* residents between the ages of 21 and 60 years,[1] regardless of whether they are qualified electors. Ordinarily, a person in military service continues to maintain his legal residence at the place where he resided when he entered service. In that case, he is subject to payment of the poll tax in that county, and he may vote in that county if he is

[1]Certain classes within these age limits are exempt from the 50-cent statutory part of the state tax and from county and city poll taxes, but all persons between 21 and 60 are liable for the constitutional $1.00 tax. *Tondre v. Hensley,* 223 S.W. 2d 671 (Tex. Civ. App. 1949); Art. 5.09, Vernon's Texas Election Code.

otherwise qualified. However, if he should happen to change his residence to some other county during military service, he would be subject to payment of the tax in the county of his new residence; but payment of the tax would not entitle him to vote in the county of his former residence, nor could he vote in the county of his new residence. And, of course, voluntary payment of the tax in the county of his former residence would not entitle him to vote in that county.

This brings up the question of the form of the poll tax receipt to be issued to persons in military service. They should be issued the regular receipt form and should be placed on the poll tax rolls in the same manner as other poll tax payers. In the few instances where persons change their residence during military service, the regular receipt form will still be used, even though the holder cannot vote on it unless he is released from active service. As already pointed out, there are other instances in which poll tax holders are not entitled to vote, yet the statute makes no provision for issuance of a special form of receipt except where the taxpayer is an alien or where the tax is paid after January 31. Arts. 5.12 and 5.14, Vernon's Texas Election Code.

In answer to your fourth question, you are advised that the recent amendment does not make any change in the poll tax laws. The tax is levied only on residents between the ages of 21 and 60 years. Art. 5.09, Vernon's Texas Election Code. The state poll tax is still $1.50, and counties may levy a tax not to exceed 25 cents. Art. 7046, V.C.S. Members of the National Guard will still pay the constitutional state tax of $1.00 but will be entitled to exemption from the balance of the tax upon compliance with Article 5841, V.C.S.

Summary

The constitutional amendment relating to voting by persons in military service, adopted on November 2, 1954, became effective on November 19, 1954. The amendment is self-enacting and supersedes all conflicting statutes.

The amendment removes the voting disqualification against members of the regular military establishment. All persons in military service are now qualified electors if they meet other constitutional requirements. However, a person in military service may vote only in the county in which he resided at the time he entered service. This restriction applies only to persons on extended active duty; it does not apply to members of the National Guard and reservists who are not on extended active duty.

While absence from one's place of residence during military service does not of itself cause a loss of residence, it is possible for a person to abandon his old residence and acquire a new one while he is in service. If he does so, and thereby changes the county of his residence, he cannot vote so long as he continues in service, unless he reestablishes his legal residence in the county in which he resided when he entered service.

The amendment repealed Section 2a of Article VI of the Constitution of Texas, which waived payment of the poll tax by military personnel as a condition precedent to voting in time of war and for a certain period after its termination.

Voters in military service must comply with the laws relating to payment of poll tax and to obtaining exemption certificates to the same extent and

in the same manner as civilian voters. The regular receipt form should be used for their poll tax receipts.

Yours very truly,

JOHN BEN SHEPPERD
Attorney General

By [Signature]
MARY K. WALL
Assistant

APPROVED:
John Atchison
Reviewer

Robert S. Trotti
First Assistant

2. Opinion No. C-173, rendered November 6, 1963.

Honorable Jack N. Fant
County Attorney
El Paso County
El Paso, Texas

Opinion No. C-173
Re: Construction and constitutionality of Article 5.02, Texas Election Code, relative to voting by members of the Armed Forces while on active duty.

Dear Sir:

You have requested an opinion on the construction and constitutionality of the following provisions in Article 5.02, Vernon's Texas Election Code, which were added by an amendment enacted by the 58th Legislature (Acts 58th Leg., 1963, ch. 424, sec. 13):

"Notwithstanding any other provision of this section, any member of the Armed Forces of the United States or component branches thereof who is on active duty in the military service of the United States may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces. This restriction applies only to members of the Armed Forces who are on active duty, and the phrase 'time of entering such serv-

ice' means the time of commencing the current active duty. A re-enlistment after a temporary separation from service upon termination of a prior enlistment shall not be construed to be the commencement of a new period of service, and in such case the county in which the person resided at the time of commencing active service under the prior enlistment shall be construed to be the county of residence at the time of entering service."

You have also asked for an opinion on corresponding provisions in Article 5.02 of the Election Code as amended by Chapter 430, Acts 58th Legislature, which will take effect and supersede the above-quoted provisions if the proposed constitutional amendment abolishing payment of the poll tax as a prerequisite for voting is adopted at the election to be held on November 9, 1963. These provisions are quoted at a later point in the opinion.

You have asked the following questions:

"1. What construction or interpretation does your Department make of the first sentence in paragraph two of Article 5.02, Texas Election Code, as amended, which reads: 'Notwithstanding any other provision of this section, any member of the Armed Forces of the United States or component branches thereof who is on active duty in the military service of the United States may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces.'?

"2. What construction or interpretation does your Department make of the remaining two sentences in paragraph two of Article 5.02?

"3. What is meant by the term 'temporary separation' in the third sentence of paragraph two of Article 5.02?

"4. In the event the poll tax amendment is adopted at the election to be held on November 9, 1963, then what construction do you make of the amended portion of Article 5.02, Texas Election Code, effective February 1, 1964, which reads: '* * * provided that any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which such person resided at the time of entering such service.'?

"5. Are the provisions contained in Article VI, Section 2 of the Texas Constitution and amended Article 5.02 of the Texas Election Code, as pertains to the right of members of the Armed Forces to vote in Texas, violative of or repugnant to Section 1 of the 14th Amendment to the United States Constitution?"

Section 1 of Article VI of the Texas Constitution enumerates the classes of persons who are not allowed to vote in this State. Section 2 of Article VI sets out the qualifications and requirements for voting. The general qualifications are stated as follows:

"Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; and provided further, that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before offering to vote at any election in this State and hold a receipt showing that said poll tax was paid before the first day of February next preceding such election. * * *"

Prior to 1954, a provision in Section 1 of Article

VI disqualified members of the regular military establishments from voting in this State. The historical background of this provision is described in a commentary published in Vernon's Annotated Texas Statutes, Volume 9, page XVII, in the year 1952:

> "The Second Congress [of the Republic of Texas] in 1837 enacted the first election law * * *. This first act contained a novel section providing 'that regular enlisted soldiers, and volunteers for during the war, shall not be eligible to vote for civil officers.' This provision was no doubt inspired by the mutinous conduct of the nonresident volunteers who had been recruited in the United States after the Battle of San Jacinto. They had defied the provisional government and on one occasion in July, 1836, had sent an officer to arrest President David G. Burnett and his cabinet to bring them to trial before the army. They had continued their rebellious conduct after Sam Houston became the first president under the Constitution of 1836. It was not until May, 1837, that Houston was able to dissolve the army and eliminate this threat to civil authority. This provision disfranchising soldiers in the regular army was placed in the 1845 Constitution of the State of Texas and has remained in each succeeding constitution. It was modified in 1932 to exempt the National Guard and reserves and retired officers and men."

In 1954, Section 1 of Article VI was amended to delete the disqualification against persons in military service, and Section 2 was amended to add the following provision:

> "* * *Any member of the Armed Forces of the United States or component branches thereof or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Two former opinions of this office, Opinion S-148 dated December 18, 1954, and Opinion WW-157 dated July 8, 1957, have dealt with several questions of construction arising under the 1954 amendment of the Constitution. The following quotation is from Opinion S-148:

> "Formerly, National Guardsmen, reservists and draftees in active service could vote at the place of their legal residence at the time of voting (provided they had resided within the State for one year and within the county for six months) without regard to the place of residence at the time they entered service. Active members of the regular establishment could not vote at all. Now, all these groups are qualified electors if they meet other requirements, but none of them may vote anywhere in Texas except in the county where they resided when they entered service. If a person in military service changes his legal residence to some place other than the county in Texas in which he resided at the time he entered service, he cannot vote in this State.
>
> "Throughout this opinion the term 'residence' means legal residence as distinguished from actual residence.
>
> "The constitutional amendment does not change the rules for determining what place is the legal residence of the voter, nor does it mean that in all circumstances a person in military service will be entitled to claim a voting residence in the county of which he was a resident at the time he entered service. Place of residence is still to be determined in the same way that it has always been. Absence from the county or State for the purpose of performing military service does not of itself cause a loss of residence, but it is possible for a person to abandon his old residence and acquire a new residence during time of service. Tex.Const. Art. XVI, Sec. 9; *Clark v. Stubbs,* 131 S.W.2d 663 (Tex. Civ.App. 1939); *Struble v. Struble,*

177 S.W. 2d 279 (Tex.Civ.App. 1943); *Pettaway v. Pettaway,* 177 S.W.2d 285 (Tex.Civ.App. 1943); *Robinson v. Robinson,* 235 S.W.2d 228 (Tex.Civ.App. 1950); 15 Tex. Jur. 715, Domicile, Sec. 6. If he does so, and thereby changes his residence to some other county, he loses his right to vote in this State while he continues in service, unless he re-establishes his residence in the county in which he resided when he entered service. Further, no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.

"It is our opinion that the restriction to voting in the county of residence at the time of entering service applies only to persons who are on extended active duty. Members of the National Guard and reservists who are not on extended active service and retired military personnel are not subject to this restriction. Further, 'county of residence at the time of entering such service' means the county in which the person resided at the time he began his current active service. To illustrate: A person, while residing in County A, joins one of the reserve components but does not go into active service. He later moves to County B. After he has fulfilled the length of residence requirement, he may vote in County B; in fact, he could vote nowhere else. While living in County B, he is called into active service. During this time his place of voting is in County B, the county in which he resided when he went into active service. After his release from that tour of duty, he changes his residence to County C. His place of voting is in County C so long as he continues to live there. If he is again called into active service while living in County C, that is the place where he will vote."

The question in Opinion WW-157 was whether a person who had been stationed at an air base in Victoria County, who after discharge had subsequently re-enlisted, with some period of time intervening be-

tween the discharge and re-enlistment, was qualified to establish a domicile for voting purposes in Victoria County. In answer, the opinion said:

"What is meant by 'the time of entering such service' within the meaning of the Constitution? Is it the time of subsequent enlistment or the time of the original entry into service? If the subsequent period of service is a mere continuation of the prior period, the time of re-enlistment is not the time of entering such service within the meaning of the Constitution, for the restriction lasts 'so long as he or she is a member of the Armed Forces.'

"No doubt, in some instances an airman may be completely separated from the service in a very real sense by discharge and later re-enlist. In such cases it cannot be said that his re-enlistment or decision to re-enlist constituted the second period of service a continuation of the prior period of service, and the time of entering such service within the meaning of the Constitution is the time of his re-enlistment. The mere fact that there has been a discharge and a time lapse between the date of discharge and the date of re-enlistment is not, however, controlling on this question. The law looks to the substance and not to the mere form of the transaction. It can be judicially noted that frequently re-enlistment papers are actually signed prior to discharge and postdated at some later date to the discharge date. On some occasions the service man retains the same privileges, rank, and status as well as the same organization assignment and job assignment in the subsequent enlistment as in the prior period of service. In such cases the discharge and re-enlistment are mere legal fictions and the subsequent period of service is merely a continuation of the prior period. The date of re-enlistment is not the 'time of entry into such service' within the meaning of the Constitution. Residence in Victoria, Texas, at that time alone cannot be used as a basis of claiming

voting residence in Texas during the subsequent period of service.

"Therefore, we hold that an airman stationed at an air base located in Victoria County who receives a bona fide discharge and who completely severs his active duty relation with the Air Force and subsequently re-enlists with some period of time intervening between discharge and re-enlistment is qualified to establish a residence in Victoria County for voting purposes if the discharge and re-enlistment are not mere legal fictions so as to constitute a continuation of the prior period of service."

Articles 5.01 and 5.02 of the Election Code are the statutory counterparts of Sections 1 and 2 of Article VI of the Constitution. Following the amendment of the Constitution in 1954, no corresponding change was made in the statutes until this year, when a series of amendments to the Election Code were enacted in Senate Bill 61, Chapter 424, Acts of the 58th Legislature, 1963.

Senate Bill 61 was drafted by an interim Election Law Study Committee created by the 57th Legislature (S.C.R. 30, 57th Leg., R.S. 1961). The files and reports of the Committee reveal that the amendment to Article 5.02 undertook to express in statutory form the constitutional provision as interpreted in the opinions of the Attorney General. The second sentence of the new paragraph in Article 5.02 states the holding of Opinion S-148 which construed the restriction on place of voting as applying only to periods of active service. The third sentence undertakes to summarize in a brief statement the holding of Opinion WW-157 on the effect of a temporary break in service between enlistment periods.

We are in agreement with the construction given

to the constitutional provision in Opinions S-148 and WW-157. And we are further of the opinion that the construction of the constitutional provision is applicable to Article 5.02. We therefore believe that those opinions sufficiently answer your first two questions.

In answer to your third question, as to the meaning of "temporary separation" in Article 5.02, we think the term was intended to mean a separation under circumstances described in Opinion WW-157 which would not prevent the subsequent period of service from being in essence merely a continuation of the prior period. It is not possible to lay down a blanket rule setting out the circumstances in detail, as each case must be determined on its own particular set of facts as to the acts and intention of the individual.

Two examples will illustrate how these provisions operate. Suppose a soldier, while stationed at Fort Bliss in El Paso County, has established his legal residence there (but without voting rights, because he did not reside in that county at the time of entering service) and intends to live there after eventual retirement from military service. He completes an enlistment and is discharged, but at all times his intention for the present is to re-enlist and continue in military service. Even though some period of time may elapse between his discharge and his re-enlistment, the two enlistments would ordinarily constitute one continuous period of service within the meaning of these provisions. Suppose, however, that at the time of his discharge he has no intention of re-entering military service. After seeking employment he finds nothing to his liking and he thereupon decides to go back into military service. Ordinarily this would be the beginning of a new period of service, and he could vote in El Paso County if otherwise qualified.

The Constitution provides that a person in military service may vote only in the county in which he resided at the time of entering service. (It should be noted that the place of voting is the county of residence, not the county in which the enlistment occurred, which might be in some other place than the place of legal residence.) In a brief submitted to this office by an interested organization, the contention is made that this provision of the Constitution attempts to regulate voting rights outside Texas as well as within the State. It goes without saying that the Texas Constitution cannot regulate voting rights of persons at any place other than within the State of Texas, and cannot affect the voting rights of residents of other States while stationed in Texas. This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the county in which he resided at the time of entering service, and if at that time he did not reside in any county in Texas, it follows that he cannot vote in this State. Accordingly, it was said in Opinion S-148 that no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.

It has been suggested in the brief that the provisions under consideration do not preclude a nonresident of Texas from establishing a legal residence and becoming a qualified elector having the privilige to vote in Texas; that a resident of Texas who enters military service cannot change his voting residence while on active duty, and that a former nonresident, after having acquired a voting residence while on active duty in this State, cannot thereafter change it to some other county, but that a resident of another State can ac-

quire an original voting residence in Texas while in military service.

We are unable to find support for this suggestion, either in the language used or in the reason for the restriction. As we view it, the purpose of the restriction is to prevent a concentration of military voting strength in localities where military installations are situated, which "might well lead to complete domination and control of local politics by the overwhelming number of military men to the prejudice of the civilian citizens of the community." Interpretive commentary under Art. VI, Sec. 1, Vernon's Ann. Tex. Const., Vol. 2, p. 336. The concentration sought to be prevented could come about from voting by former residents of other States as readily as from voting by former residents of other counties in this State. We fail to see the rationale for allowing a resident from some other State who is stationed at Fort Bliss to acquire a voting residence in El Paso County, while denying that privilege to a resident of Texas; nor do we see any rationale for freezing his voting residence in El Paso County if he is transferred to a military installation in some other county or State.

We are not impressed by the suggested explanation that the person who resided in Texas at the time of entering service does have a place to vote in Texas (i.e., the county of his residence at the time of entering service), but the person who resided in some other State at the time of entering service would have no place to vote in Texas if he could not acquire a voting residence at the place where he was stationed. The 1954 amendment evinces an intention to remove the disfranchisement of active members of the regular military establishments, but subject to the limitation that they will not be allowed to acquire a new voting residence in

this State while in military service. It does not show an intention to enfranchise any person or class of persons in military service on any other terms. It should be kept in mind that a person who enters military service as a resident of some other State gives up his voting residence in that State only by his own volition. So far as we are able to find, there is not a State in the Union whose laws cause a resident to lose his residence and concomitant voting rights against his will by reason of absence in military service. If he loses his residence and voting privileges at the place where he resided when he entered service, it is by his own desire to acquire a new residence at a different place. You have stated that many of the military personnel tell you that when they write to the State and county where they entered the service, so as to vote absentee there, that State takes the position that they have now lost their residence there. In these cases, it would seem that the individual by his own voluntary acts has relinquished his former residence or that the administrative officers of his home State have misinterpreted the law of that State.

It has also been suggested that the law discriminates against residents of other States and is therefore repugnant to the 14th Amendment of the United States Constitution. We do not agree that it discriminates against nonresidents. A Texas resident is under the same limitation as a nonresident. No matter how much a soldier at Fort Bliss might prefer El Paso County to his home county in East Texas, or North Texas, or South Texas, and might want to make El Paso his county of legal residence, he has to choose between acquiring a domicile in El Paso County and losing his right to vote, for if he does change his residence to El Paso County he also is left without a voting place.

It is true that military men who have been many years away from their place of residence at the time of entering service may lose interest in the affairs of that locality, but may be keenly interested in the affairs of the locality where they are stationed, and the privilege of retaining their voting residence at the former place may be to them an empty one. It is also true that the Texas resident stationed in Texas could still vote for state offices and on state-wide issues of interest to him, whereas the resident of some other State would find no area of interest in the elections of his home State except for President and Vice-President of the United States. These are considerations going to the policy, wisdom, and equity of the constitutional restriction, rather than to its interpretation. We hasten to state that our function is merely to construe the provisions as they are written.

In your fourth question you ask for a construction of the provision on military voting in the amendment of Article 5.02 of the Election Code which will take effect if the proposed constitutional amendment abolishing payment of the poll tax as a prerequisite for voting is adopted at the election to be held on November 9, 1963. Acts 58th Leg., 1963, ch. 430, sec. 1, p. 1103. The pertinent portion of the proposed amendment of Article VI, Section 2 of the Constitution reads:

> "Section 2. Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided that any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote

only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces; and provided further, that before offering to vote at an election a voter shall have registered if required by law to do so. * * *"

Insofar as it concerns place of voting by persons in military service, there is no change in the meaning of the section although the language has been rearranged. The text of Article 5.02 of the Election Code, as amended to take effect in event of adoption of the constitutional amendment, is as follows:

"Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, and who shall have registered as a voter if required to do so, shall be deemed a qualified elector; provided that any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which such person resided at the time of entering such service. * * *"

This provision tracks the proposed constitutional amendment, except for omission of the words "so long as he or she is a member of the Armed Forces." Since the provision deals with the voting place of members—not former members or future members—of the Armed Forces, the omission of the qualifying clause does not change its meaning. Unlike the amendment enacted by Chapter 424, this version of the statute does not contain the provisions incorporating the interpretations of the Attorney General's opinions. But the addition of those provisions did not alter existing law; it merely

verbalized the existing law into statutory form. Accordingly, the law as it will exist if Chapter 430 takes effect will be the same as it is now.

Your fifth question is whether the constitutional and statutory provisions under consideration violate Section 1 of the 14th Amendment to the United States Constitution, which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We have seen that the law of this State completely disfranchised all persons in military service for almost a hundred years and disfranchised members of the regular establishments for twenty more years. If those provisions did not offend the Federal Constitution, it is evident that the less drastic provisions of the present law also are not subject to that infirmity. The 14th Amendment was ratified in 1868. During the intervening years before Section 1 of Article VI of the Texas Constitution was amended in 1954, there was no case directly raising the validity of the Texas law, but the implication in two cases decided by the Texas courts seems to be that the State had the power to withhold suffrage from persons in military service. In *Savage v. Umphries,* 118 S.W. 893, 899 (Tex.Civ.App. 1909), the court said:

> "Who shall exercise suffrage is a fundamental question, which the body politic must decide upon a just view of the true relation between the power

of the suffragans and the rights of the whole people. Hence the exercise of the elective franchise is not a natural or God-given right, but is, as the word 'franchise' implies, a right conferred by the state or body politic. In other words, as is said by an eminent authority on constitutional law, the questions whether one is fitted by intelligence to perform the function of an elector, or has such interests in the matters controlled through his suffrage as to check the misuse of power which self-interest prompts, or has such community of interest in the laws which are to govern the community, which should fit him for the discharge of the duties of a suffragan, must be determined by the body politic."

One of the holdings in that case was that under Article VI, Section 1 of the Texas Constitution, a person in the service of the army of the United States was not entitled to vote at all. 118 S.W.2d at page 908. In *McBeth v. Streib,* 96 S.W. 2d 992, 995 (Tex. Civ. App. 1936), the court said:

"Our organic and statutory laws, in plain terms, deny the right of franchise to citizens in the military service. The reasons for such denial were properly determined by the adopters of the Constitution and members of our lawmaking bodies."

Solon v. State, 54 Tex.Crim. 261, 114 S.W. 349, 352 (1908) describes the nature of suffrage as follows:

" * * * The true rule is that the right to vote is not a necessary or fixed incident of citizenship, or inherent in each and every individual, but that voting is the exercise of political power, and no one is entitled to vote, unless the people in their sovereign capacity, have conferred on him the right to do so. It may be laid down as a general proposition that the right of suffrage may be regulated and modified or withdrawn by the authority which conferred it. * * * In the case of State v.

Dillon, 32 Fla. 545, 14 So. 383, 22 L.R.A. 124, in treating this general subject, the court say: 'The right to vote is not an inherent or absolute right found among those generally reserved in bills of rights, but its possession is dependent upon constitutional or statutory grant. Subject to the limitations contained in the federal Constitution, the elective franchise is under the control of the sovereign power of the states, expressed in Constitutions or statutes properly enacted. * * *' "

The United States Constitution does not confer on or guarantee to citizens the right to vote, but it does limit the power of a State to abridge or deny to some citizens a right of suffrage which the State has granted to others. 18 Am.Jur., Elections, §§ 46, 47; 29 C.J.S., Elections, §§ 5-8. The 15th and 19th Amendments prohibit denial of the right to vote because of race, color, previous condition of servitude, or sex. The 14th Amendment prohibits a State from abridging the privileges or immunities of citizens of the United States or from denying the equal protection of the laws to any person within its jurisdiction; but these prohibitions do not preclude a State from making reasonable classifications of persons or things for the purpose of legislation if all within the same class are treated alike. The general principles on the validity of classifications are stated in the following quotations from 16A C.J.S. 240 et seq., Constitutional Law, § 489:

"Class legislation is invalid where the classification is arbitrary and unreasonable. The provision of the Fourteenth Amendment to the federal Constitution declaring that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deny to any person within its jurisdiction the equal protection of the laws, as well as provisions commonly found in state constitutions prohibiting the enactment of laws granting any special or

exclusive privileges, immunities, or franchises, * * * render void all state statutes which make any unreasonable or arbitrary discrimination between different persons or classes of persons. * * *

"There is no general rule by which to distinguish a reasonable and lawful from unreasonable and arbitrary classification, the question being a practical one, dependent on experience, and varying with the facts in each case. In order to be valid a statutory classification must reasonably promote some proper object of public welfare or interest, must rest on real and substantial differences, having a natural, reasonable, and substantial relation to the subject of the legislation, and must affect alike all persons or things within a particular class, or similarly situated; but, if the legislature has power to deal with the subject matter of the classification and there is a reasonable ground for the classification and the law operates equally on all within the same class, it is valid, even though the act confers different rights or imposes different burdens on the several classes, or fails to provide for future contingencies, or though particular persons find it difficult or even impossible to comply with conditions precedent on which the enjoyment of the privilege is made to depend. * * *

"In determining whether or not a basis of classification is reasonable, it must be looked at from the standpoint of the legislature enacting it, and with reference to the conditions existing when the statute was enacted, not when the constitution was adopted. As discussed supra § 151 (4), the question of classification is one primarily for the legislature, and in the exercise of this power the legislature possesses a wide discretion. A statute will be sustained where the basis for classification made by it could have seemed reasonable to the legislature, even though such basis seems to the courts to be unreasonable. In view of the presumptions in favor of a legislative classification, as discussed supra § 100, the legislative judgment as to

classification will be upheld if any state of facts can reasonably be conceived to sustain it, and can be overthrown by the courts only when it is clearly erroneous."

The Texas Constitution classifies persons in military service for special treatment in conferring the right to vote, and accords the same treatment to all within that class. We are unable to say that there is no rational basis for the classification, and consequently it is our opinion that the provision does not violate the 14th Amendment to the United States Constitution.

SUMMARY

The provisions of Article 5.02, Vernon's Texas Election Code, as amended by Chapter 424, Acts of the 58th Legislature, 1963, which pertain to voting by persons in military service, do nothing more than restate the law as contained in the 1954 amendment to Article VI, Section 2 of the Texas Constitution. Attorney General's Opinions S-148 and WW-157, interpreting the constitutional provisions, are reaffirmed.

The law on voting by persons in military service, as contained in the amendment to Article VI, Section 2 of the Constitution which is proposed by S.J.R. No. 1, 58th Legislature (to be submitted to a vote on November 9, 1963) and in Article 5.02 of the Election Code, as amended by Chapter 430, Acts of the 58th Legislature, which will take effect if the proposed constitutional amendment is adopted, is the same as the present law.

The provisions of Article VI, Section 2 of the Texas Constitution, and of Article 5.02 of the Texas Election Code, which provide that members of the Armed Forces of the United States may

vote only in the county in which they resided at the time of entering service, does not violate the 14th Amendment to the United States Constitution.

Yours very truly,

WAGGONER CARR
Attorney General

By [Signature]
MARY K. WALL
Assistant

APPROVED:

OPINION COMMITTEE
W. V. Geppert, Chairman
Howard Fender
Malcolm L. Quick
Ernest Fortenberry
Paul Robertson

APPROVED FOR THE ATTORNEY GENERAL
By: Stanton Stone

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 82

SERGEANT HERBERT N. CARRINGTON,

Petitioner,

vs.

ALAN V. RASH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF FOR THE PETITIONER

WAYNE WINDLE
W. C. PETICOLAS
Suite 12-E
El Paso National Bank Building
El Paso 1, Texas
Attorneys for Petitioner.

PETICOLAS, LUSCOMBE & STEPHENS
of Counsel

INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES:

CONSTITUTION OF THE UNITED STATES:

CONSTITUTION OF THE STATE OF TEXAS:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 82

SERGEANT HERBERT N. CARRINGTON,

Petitioner,

vs.

ALAN V. RASH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF TEXAS

BRIEF FOR THE PETITIONER

Opinion Below

The Supreme Court of Texas has issued majority and dissenting opinions in this case, which begin on pages 20 and 26 of the Record. The opinion has been reported at 378 S.W.2d 304.

Jurisdiction

The judgment of the Supreme Court of Texas was entered on April 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Question Presented

In 1954, the following provision was added to Section 2 of Article VI of the Texas Constitution:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The Supreme Court of Texas held in its decision rendered on April 29, 1964, that, by virtue of this provision, a nonresident at the time of entering the military service of the United States cannot acquire a voting residence in Texas so long as he is in the military service. The question thus presented is:

> Does the provision of the Texas Constitution which prevents persons in the military service from acquiring a voting residence in the county in which they are bona fide legal residents for all other purposes constitute such discrimination against persons in the military service as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

Constitutions Involved

This case involves the last provision of Article VI, Section 2 of the Constitution of the State of Texas. Said provision is set out verbatim in the preceding paragraph. It may be found in Volume 2 of *Vernon's Annotated Texas Constitution,* on pages 339 and 340.

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added.)

Statement

Respondents in this proceeding are Honorable Waggoner Carr, Attorney General of Texas; Honorable Alan V. Rash, Chairman of the Republican Party Executive Committee of El Paso County, Texas; and Honorable Margaret Hockenberry, the "Presiding Judge", who by law has the duties of conducting the Republican Party primary elections in Precinct No. 16 of El Paso County, Texas (R. 2, 18).

Petitioner is a Sergeant in the United States Army. He entered the service in 1946 when he was a resident of Jefferson County, Alabama, and he has been continuously in the military service since that time (R. 3, 18).

Petitioner was born in Bessemer, Alabama, and he is now a resident of El Paso County, Texas. He is thirty-six (36) years of age. He has resided in El Paso County since February of 1962 when he and his family decided to make El Paso their permanent home, and purchased a house at 3408 Sirius Drive. Petitioner presently lives at this address with his wife and two children. He has a son, Bruce Allen, 8 years of age, and a daughter, Debra Lynn, 6 years of age.

Both children attend the public schools in El Paso County, Texas (R. 3, 18).

Petitioner has designated El Paso, Texas, as his permanent home for all purposes on his military records. He intends to reside in El Paso County, Texas, for the remainder of his life. Petitioner is now stationed at White Sands, New Mexico. He has been stationed there since prior to 1962, and at the time he selected El Paso as his home, he had the choice of living in either New Mexico or Texas. He moved to Texas simply because he liked El Paso County and wanted to live here permanently. Because Petitioner has declared El Paso County to be his home for all purposes, he cannot qualify to vote in any county or state other than El Paso County, Texas (R. 3, 18).

Petitioner has purchased a small business which was located in Las Cruces, New Mexico. He has moved the business to El Paso County where he plans to conduct it on a partnership basis (R. 3, 4 and 18).

In Paragraph III of Respondent Carr's Answer to the Petition for Writ of Mandamus, said Respondent stated:

> "Respondent does not deny that Relator is a legal resident of the State of Texas or that this residence carries with it all the rights, privileges and duties of residence except the right or privilege of voting and those rights, privileges and duties which are based on a resident's being a qualified voter" (R. 18).

On December 17, 1963, Petitioner paid the poll tax levied for the year 1963 to the County Tax Collector of El Paso County, Texas. In exchange for such payment, Petitioner received a poll tax receipt which states on its face that it is to be used for voting in the year 1964. Thereafter, on March 18, 1964, Petitioner wrote a letter to Respondent Rash, asking whether or not Petitioner would be allowed

to vote in the Republican Party primary election to be held in 1964. Respondent Rash, in this capacity as Chairman of the Republican Party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, as "Presiding Judge" of Precinct No. 16, answered by letter that:

> "Mrs. Margaret Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified voter. We have taken this position because he is in the United States Army and he resided outside the State of Texas at the time he entered the military service" (see Exhibit "C" of the Petition for Writ of Mandamus) (R. 4, 10-15).

In 1954 the following provision was added to Article VI, Section 2, Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces" (R. 21, 27).

Prior to Petitioner's correspondence with the Respondents Rash and Hockenberry, the Respondent Attorney General, in an opinion, had interpreted the above-quoted provision of Section 2 of Article VI of the Texas Constitution in the following manner:

> ". . . This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering the service, and if at that time he did

> not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that *no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.*" (Emphasis added.) (R. 5, 13, 20, 21 and 27.)

Based on this opinion, Respondents Rash and Hockenberry refused to recognize Petitioner as a qualified voter (R. 5, 14, 15 and 28).

Upon receiving the letter from Respondents Rash and Hockenberry, which is Exhibit "C" attached to the Petition for Writ of Mandamus (R. 12), Petitioner filed an Original Petition for Writ of Mandamus in the Supreme Court of the State of Texas (R. 2). In said Petition for Writ of Mandamus, Petitioner contended that the above-quoted provision of the Texas Constitution discriminated against persons in the military service, and, therefore, violated the Equal Protection Clause of the Fourteenth Amendment (R. 6). Said contentions were presented in Petitioner's brief and upon oral argument. The Supreme Court of Texas divided on the question of whether or not the Texas Constitution violated the Fourteenth Amendment, and said Petition for Writ of Mandamus was finally denied in a seven to two decision (R. 20-31).

Summary of Argument

Under Article VI, Section 2 of the Texas Constitution, members of the military service who resided outside of the State of Texas when they entered the service but who are now admittedly legal residents of Texas cannot acquire a voting residence in Texas (R. 18, 20). This provision of the Texas Constitution has the effect of preventing Petitioner and other servicemen similarly situated, from ever

becoming a qualified voter in any election so long as they remain in the military service and reside in Texas (R. 3, 18 and 28). The provision segregates all persons in military service as a class, which class is to be treated differently from other persons in regard to the right to vote. Such a distinction is arbitrary and unreasonable because men and women who are members of the Armed Forces should have at least the same voting privileges as members of other professions. Therefore Article VI, Section 2 of the Texas Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

The last sentence of Section 2 of Article VI of the Texas Constitution reads as follows:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Under the interpretation given said provision, it has the effect of depriving Petitioner of the right to become a qualified voter in any national, state or local election anywhere in the United States so long as he resides in Texas and remains a member of the Armed Forces of the United States (R. 3, 18 and 20). This is so because when Petitioner acquired a legal residence in Texas he lost all voting privileges that he may have had in any other state for the reason that he cannot now meet the residence requirements of any other state. Since the majority of the Texas Supreme

Court has held in this case that the Petitioner cannot acquire a voting residence in Texas, he is left without a place to vote (R. 20, 28).

The Respondent, Waggoner Carr, may contend that the Petitioner, by changing his legal residence to Texas, voluntarily gave up his right to vote in his original state of residence. However, under the facts of this case, since the Petitioner was only 18 years of age when he originally entered the service, in all probability he never had an opportunity to establish a voting residence prior to entering the service. If all states had the same constitutional provision as Texas, Petitioner most certainly could not have acquired a voting residence in any state since entering the service in 1946.

The sole reason for denying Petitioner the right to acquire a voting residence in Texas is that he is in the military service (R. 16, 18, 19 and 20). Respondents admit that the Petitioner would be a qualified voter in Texas if he were not in the military service (R. 16, 18 and 19).

So far as Petitioner can ascertain, Texas is the only state in the United States which denies voting privileges to a legal resident of the State solely for the reason that he is in the military service. Construction workers, doctors, lawyers or tenant farmers who resided in another state when they entered their professions or began their occupations can move to Texas and become qualified voters without retiring or resigning from their professions and occupations. Any law which permits out-of-state civilians to establish residence and become voters but prevents out-of-state servicemen from establishing residence and becoming voters, denies these persons who entered military service from another state and who now reside in this state, the equal protection of the laws. Such a distinction is patently arbitrary and unreasonable.

As stated in the dissenting opinion delivered below, it is elementary that "class legislation" is invalid where the classification is arbitrary and unreasonable (R. 30). The classification must rest on real and substantial differences and must reasonably promote some proper object of public welfare or interest (see *Lassiter* v. *Northampton County Bd. of El.*, 360 U.S. 45 (1959)).

Under the interpretation which has been given to the last provision of Article VI, Section 2 of the Texas Constitution, such provision, by prohibiting members of the military from acquiring a new voting residence while they are in the military service in Texas, defines and creates a special class within this State which, for no reason, is denied the rights and privileges which all other United States citizens possess. Apparently no argument is advanced that the persons of the class are immature, or are of unsound mind or are criminals or public charges. The only thing that can be found to distinguish them from other citizens is that they are members of the Armed Forces.

In the present case, Respondent Carr contends that the purpose of the constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to "complete domination and control of local politics" by military men to the prejudice of the civilian citizens of the community. It is our position that this contention is misleading because there is no proof that there is any such area where the military voting strength would control the local politics, because as a practical matter, many servicemen are not qualified voters in that they have not attained voting age, or are not bona fide residents of the State of Texas, or have failed to pay the poll tax or register for voting in a federal election. However, it is our contention that if a majority of qualified

electors in a particular community happen to be members of the military service, then like any other voting majority, they are entitled to exercise complete dominion and control over local politics.

Not unlike most civilians who move to Texas, Petitioner voluntarily selected Texas to be his permanent home. Petitioner was not forced to move to Texas because of his occupation. In fact, Petitioner is stationed at White Sands, New Mexico, and lives in Texas for no reason other than he likes the City of El Paso, Texas (R. 3, 18). If the matters of concern were that persons in the military service acquire a new residence by the order of their superiors and not by their own choice, and that merely living in Texas is no proof of a desire to make it their permanent residence, then the remedy would be to prescribe what acts are necessary for military personnel to prove the requisite intent to establish permanent residence, rather than to prevent the possibility of establishing residence for voting, no matter what the quantum of proof that their intended home is their newly acquired residence. To foreclose this possibility is to arbitrarily deny military personnel stationed in Texas equal protection of the laws.

Since the Petition for Writ of Certiorari was filed in this Court, a Three-Judge United States District Court, sitting at San Antonio, Texas, has ruled on a very similar case. The Three-Judge Court unanimously agreed with the dissenting opinion delivered below in this cause, and the Three-Judge Court specifically held that Article VI, Section 2 of the Texas Constitution violated the Equal Protection Clause of the Fourteenth Amendment. See *Mabry* v. *Davis,* 232 F.Supp. 930 (W.D. Tex. 1964). The *Mabry* case was tried before Circuit Judge Brown, Chief Judge Spears, and District Judge Thornberry.

In the *Mabry* case, at page 934, the Court quoted extensively from the dissenting opinion delivered in this cause by Associate Justice Clyde E. Smith and concurred in by Chief Justice Robert W. Calvert. The Three-Judge Court specifically approved and adopted the following portion of Justice Smith's opinion:

> "In the present case Respondents contend that the purpose of the Constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to complete domination and control of local politics by military men to the prejudice of the civilian citizens of the community. In my opinion this is not a reasonable ground upon which the State can say that there exists a real and substantial difference between Servicemen and other citizens, and thereby confer different voting rights on these classes.
>
> "With present day mobility and industrialization, large groups, *other than servicemen,* move into the various communities of this state for limited stays, and establish voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact.
>
> "Wherein lies the reasonable basis for distinguishing between these groups?
>
> "In the recent case of *Gray* v. *Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), our Supreme Court has said:
>
> "'. . . there is no indication in the Constitution that homesite or *occupation* affords a permissible basis for distinguishing between qualified voters within a State. . . .' (Emphasis added.)

"'. . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, *whatever their occupation,* whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those *who meet the basic qualifications.* . . .'" (Emphasis added.)

The apportionment cases recently decided by this Court emphasize the paramount importance of a citizen's right to vote, and this Court, in very recent decisions, has made it abundantly clear that there may be no discrimination against a class of individuals.

In *Davis* v. *Mann,* 377 U.S. 678 (1964), this Court was concerned with areas in the State of Virginia containing "large numbers of military and military-related personnel." In the *Davis* case Chief Justice Warren, expressing the views of six members of the Court, stated the following at page 617 of 12 L.Ed.2d:

"Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown is constitutionally impermissible."

In *Wesberry* v. *Sanders,* 376 U.S. 1 at page 17 (1964), Justice Black, in the majority opinion, stated the following:

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the

> right to vote is undermined. Our constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

In a separate opinion in *Wesberry*, Justice Clark said,

> "[T]he Equal Protection Clause of the Fourteenth Amendment forbids . . . discrimination. It does not permit the states to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all."

In *Reynolds* v. *Sims*, 377 U.S. 533, 12 L.Ed.2d 506, at page 523 (1964), Chief Justice Warren, expressing the views of six members of this Court, said,

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. . . . and history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by *wholly prohibiting the free exercise of the franchise.*" (Emphasis added.)

The case at bar presents a much clearer violation of the Equal Protection Clause than the apportionment cases cited

above for the reason that the State of Texas is *wholly prohibiting the free exercise of the franchise* of servicemen who have acquired a legal residence in Texas.

Conclusion

For reasons stated it is respectfully submitted that the Judgment of the Court below should be reversed.

Respectfully submitted,

WAYNE WINDLE
W. C. PETICOLAS
Suite 12-E
El Paso National Bank Building
El Paso 1, Texas
Attorneys for Petitioner

PETICOLAS, LUSCOMBE & STEPHENS
of Counsel

INDEX

Subject Index

CASES: Page

CONSTITUTIONS AND STATUTES: Page

REFERENCE BOOKS AND TREATISES:

ARTICLES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 82

SERGEANT HERBERT N. CARRINGTON,

Petitioner

vs.

ALAN V. RASH, *et al.*,

Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

---

BRIEF FOR RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS

Question Presented

The question for decision, as stated by Petitioner, is:

> "Does the provision of the Texas Constitution which prevents persons in the military service from acquiring a voting residence in the county in which they are bona fide legal residents for all other purposes constitute such discrimination against persons in the military service as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?"

Summary of Argument

I. The framers and adopters of the Fourteenth Amendment did not intend for it to apply to a state's

power to prescribe the qualifications of voters and to grant or withhold the privilege of suffrage as it sees fit. Mr. Justice Harlan's dissenting opinion in *Reynolds v. Sims,* 12 L.Ed. 2d 543, 84 S.Ct. 1395, presents irrefutable documentation of this intent. The scope of the Amendment was fixed by the intent of its adopters, and remains the same today as when adopted.

II. The state constitution under which Texas was readmitted to the Union in 1870 contained a provision that "no soldier, seaman, or marine, in the army or navy of the United States, shall be entitled to vote at any election created by this Constitution." The Texas Readmission Act approved March 30, 1870 (16 Stat. 80) contained provisions which clearly demonstrate that Congress had scrutinized the franchise provisions of the Texas constitution and were satisfied that this disfranchisement did not violate the United States Constitution. This contemporaneous construction by the Congress is entitled to great weight in determining the scope and meaning of the Fourteenth Amendment, and shows that the Equal Protection Clause, when adopted, was either not intended to apply to state franchise provisions or, if applying, was not intended to invalidate a provision such as we have in this case.

III-A. Voting is a privilege and not a right. It is not a privilege given by the Federal Constitution or springing from citizenship of the United States, and the power of each state to determine who shall constitute its electorate is subject only to specific restrictions in the United States Constitution. If the Equal Protection Clause is applicable to this privilege, a state law making special suffrage regulations for a certain class of its residents will be upheld if the classification

rests on real and substantial differences and reasonably promotes some proper object of public welfare or interest, and the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.

III-B. The purpose of the restriction on place of voting by military personnel is to prevent a concentration of military voting strength in areas where military bases are located. Such a concentration would pose two possibilities which the State of Texas deems to be inimical to the public welfare; *first,* that the control of community affairs might be dominated by the military, through pressure or persuasion of commanding officers or through concerted action of the class as a result of the cohesion which exists among the members of a military organization; *second,* that the balance of power in community affairs might rest with a group whose members are, in the final analysis, only temporary residents of the place where they are stationed and who might lack a proper understanding of local problems and a proper concern for the best interests of the community. Characteristics of military service make these possibilities more likely to occur in the case of military voters than in the case of civilian voters. The public policy which seeks to prevent these occurrences is in promotion of a proper object of public welfare.

III-C. The restriction on place of voting is not a denial of voting rights. Every state in the Union permits its residents who are in military service to retain their residence throughout service, no matter how long their absence from the state may be. Further, every state has laws permitting servicemen to vote absentee. A serviceman stationed in Texas loses voting privi-

leges only by voluntarily choosing to establish a new residence at the place where he is stationed. It would be within the power of the state to deny to persons in military service the power to establish a new residence during service, and it follows that if a state does permit servicemen to establish residence, it may regulate the privileges which attach to the residence so established.

III-D. Petitioner contends that the classification is invalid because the restriction does not include civilians whose occupations make them highly mobile, such as construction workers. Respondent's answer to this contention is that there are substantial distinguishing characteristics between the two groups, and, further, that a classification is not rendered invalid by failure to cover "the whole field of possible abuses."

III-E. Petitioner asserts an intent to maintain his domicile permanently at the place of his present residence, throughout the remainder of his military career and after retirement from service, and rests his claim of impermissible discrimination on the special circumstances of his case. The intent to remain permanently at the place where he has established a new residence while stationed there is not typical of persons in military service. Respondent takes the position that the restriction on place of voting is not unreasonable as applied to Petitioner individually, and, further, that the classification is not rendered invalid by reason of the fact that isolated cases of inequity may arise under it.

ARGUMENT

I. Inapplicability of the Equal Protection Clause of the Fourteenth Amendment

Petitioner attacks the validity of the following pro-

vision in Artiele VI, Section 2 of the Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The sole ground of attack is that the provision violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This case was argued in the lower court on April 22, 1964. Respondent's brief in opposition to the petition for writ of certiorari was filed on June 13, 1964, two days before rendition of Mr. Justice Harlan's dissenting opinion in *Reynolds v. Sims* and its companion cases (12 L.Ed.2d 543, 84 S.Ct. 1395), in which he presented what to us is incontrovertible evidence that the Equal Protection Clause of the Fourteenth Amendment does not apply to suffrage. In argument before the Supreme Court of Texas, counsel for Respondent expressed grave doubt that the framers and adopters of the Amendment intended it to apply to suffrage, but lacked the historical evidence to clinch the matter; and in view of the decisions, beginning with *Nixon v. Herndon,* 273 U.S. 536 (1927), in which this Court had applied the Equal Protection Clause to suffrage questions, the point was not pressed in Respondent's brief in opposition to the petition for certiorari.

The evidence presented in Section I, Subsections A, B, and E of Mr. Justice Harlan's dissent points up the need for critical re-examination of prior opinions by this Court which have decided questions of voting

rights on the basis of the Equal Protection Clause. His discussion is directed toward inapplicability of the Amendment as a limitation on the power of the states to apportion their legislatures as they see fit, but the material he presents also goes to its applicability as a limitation on the power of the states to grant or withhold the privilege of voting as they see fit.

For a considerable number of years after the Fourteenth Amendment was adopted, the Court clearly treated it as inapplicable to questions of suffrage. *Minor v. Happersett,* 21 Wall. (88 U.S.) 162 (1875), in refusing to invalidate a state statute excluding women from suffrage, held directly that the statute did not violate the Privileges and Immunities Clause of the Fourteenth Amendment inasmuch as suffrage was not one of the privileges of United States citizenship. The reasoning of the opinion, as well as the judgment of the Court, demonstrated also that the Court did not consider the Equal Protection Clause to have been involved, and the fact that amendment of the Constitution was deemed necessary to secure voting rights for women confirms that this was the prevailing view throughout the woman suffrage movement which culminated in submission of the Nineteenth Amendment.

Parenthetically, if the Court which decided *Minor v. Happersett* thought the Equal Protection Clause did apply to suffrage, then that case is clear authority against Petitioner's contention, since, we submit, there is far more substantial basis for classifying the military separately from the civilian citizens than for classifying the female separately from the male citizens.

Other early cases also made it clear that the Court did not consider the Fourteenth Amendment as affect-

ing suffrage—protection of suffrage was the function of the Fifteenth Amendment. See *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36, 71 (1873). Disregarding the teachings of these cases, the Supreme Court held in *Nixon v. Herndon, supra*, that it was unnecessary to consider whether a Texas statute barring Negroes from voting in the Democratic primary violated the Fifteenth Amendment because it was "an obvious infringement" of the Equal Protection Clause of the Fourteenth Amendment.[1] Other subsequent cases have also applied the Fourteenth Amendment to voting rights, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). However, every case we have found which has invalidated a state voting law under the Fourteenth Amendment could have been decided—and, we submit, should have been decided—under the Fifteenth Amendment.

We submit that, in the light of the indisputable conclusion which must be drawn from the historical material presented in Mr. Justice Harlan's opinion, it is time for a re-examination of the cases holding that the Equal Protection Clause applies to suffrage. We now ask the Court to make that re-examination and to affirm the judgment of the lower court on the ground that it reaches the correct result in holding that the state law does not violate the Fourteenth Amendment.

II. Contemporaneous Construction of the Fourteenth Amendment

From 1837, when Texas was a newly-founded repub-

[1] So far as we have found, the first intimation that the Equal Protection Clause might apply was in *Pope v. Williams*, 193 U.S. 621 (1904).

lic, until amendment of the State Constitution in 1954, the laws of Texas disfranchised part or all of its residents who were in military service. If total denial of voting privileges did not violate the Fourteenth Amendment, it would necessarily follow that the present restriction also is not invalid on that ground. The purpose of this section of our brief is to show that the Congress of the United States in 1870 interpreted this complete disfranchisement as not violating the Fourteenth Amendment; that this contemporaneous construction would be entitled to great persuasive weight in a determination of its validity; and that validity of the former provision would encompass validity of the present restriction on place of voting.

The Fourteenth Amendment was proposed to the legislatures of the several states on June 16, 1866, and proclamation of its ratification was issued on July 28, 1868. On November 30, 1869, the people of Texas ratified a new constitution which had been proposed by a constitutional convention convened under the Reconstruction Acts of Congress passed March 2, 1867 and Acts supplemental thereto, with the express view of seeking readmission to the Union. This Constitution of 1869 contained the following provisions under Article III, entitled Legislative Department:

> "Section 1. Every male person who shall have attained the age of twenty-one years, and who shall be (or who shall have declared his intention to become) a citizen of the United States, or who is, at the time of the acceptance of this Constitution by the Congress of the United States, a citizen of Texas, and shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he offers to vote, and is duly registered (Indians not

taxed excepted) shall be deemed a qualified elector; and should such qualified elector happen to be in any other county, situated in the district in which he resides, at the time of an election, he shall be permitted to vote for any district officer: Provided, that the qualified electors shall be permitted to vote anywhere in the State for State officers; And provided further, that *no soldier, seaman, or marine, in the army or navy of the United States, shall be entitled to vote at any election created by this Constitution.*" (Emphasis supplied.)

Section 1 of Article VI, entitled Right of Suffrage, read:

"Section 1. Every male citizen of the United States, of the age of twenty-one years and upwards, *not laboring under the disabilities named in this Constitution,* without distinction of race, color, or former condition, who shall be a resident of the State at the time of the adoption of this Constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote sixty days next preceding an election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the electors at any election; Provided, that no person shall be allowed to vote, or hold office, who is now, or hereafter may be, disqualified therefor, by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States: Provided further, that no person, while kept in any asylum, or confined in prison, or who has been convicted of a felony, or who is of unsound mind, shall be allowed to vote or hold office." (Emphasis supplied.)

Texas was readmitted to the Union by an Act of Congress approved March 30, 1870 (16 Stat. 80). The preamble of this Act read:

"Whereas, The people of Texas have framed and adopted a constitution of State government which is republican; and whereas the Legislature of Texas, elected under said constitution, has ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith is a condition precedent to the representation of the State in Congress: Therefore, Be it enacted * * *"

The Act contained the following proviso:

"* * * And provided further, That the State of Texas is admitted to representation in Congress as one of the States of the Union, upon the following fundamental conditions: First, That the Constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: Provided, That any alteration of said constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. * * *."

The provisos inserted in the Texas Readmission Act make it clear that Congress scrutinized with great care the suffrage clauses of the constitution under which Texas was readmitted. Moreover, Section 5 of the Fourteenth Amendment gives the Congress the power to enforce that Article of Amendment by appropriate legislation. Disfranchisement of military personnel by the Texas Constitution continued until 1954, and there was at least one other State which disfranchised members of the regular military establishments for a long

period of time.[2] Yet in all those years there was never an act of Congress outlawing the disfranchisement, and so far as we have been able to find there was never a court decision declaring it to be invalid.

The failure of the Congress which readmitted Texas to insist upon deletion of the provision in Article III, Section 1 which disfranchised soldiers, seamen and marines can only be taken as a construction by the Congress that this provision did not offend the Fourteenth Amendment. It is a settled rule that the contemporaneous and practical construction of constitutional provisions by the legislative branch, in the enactment of laws, has great weight and gives rise to a strong presumption that the construction rightly interprets the meaning of the provisions. *Williams v. United States,* 289 U.S. 553, 573 (1933); *Ex parte Quirin,* 317 U. S. 1, 41 (1942).

We have, then, a contemporaneous construction by the Congress of the United States, the body entrusted with power to enforce the mandates of the Fourteenth Amendment, that the former provision of the Texas Constitution completely disfranchising persons in military service did not violate that Amendment. If the Amendment does not proscribe their complete disfranchisement, then clearly the present restriction does not offend its terms.

---

[2]Until amended in 1920, Article VII, Section 3 of the Nebraska Constitution of 1875 (now Art. VI, Sec. 3) read: "Every elector in the military or naval service of the United States or of this state, and not in the regular army, may exercise the right of suffrage at such place and under such regulations as may be provided by law." This provision was taken as not permitting anyone in the "permanent military establishment, which is maintained both in peace and war" to vote in Nebraska. *State v. Moorhead,* 102 Neb. 76, 167 N.W. 70 (1918); 29 C.J.S., Elections, § 16, p. 37.

This contemporaneous construction necessarily must have rested either on the ground that the Equal Protection Clause did not apply to suffrage, or on the ground that the disfranchisement was not an unreasonable discrimination. On either ground, the judgment of the lower court should be affirmed.

In *Reynolds v. Sims, supra,* the Court dismissed argument in favor of the validity of state legislative apportionment schemes based on the ground that Congress had approved similar schemes in admitting states to the Union, by saying that "Congress presumably does not assume, in admitting States into the Union, to pass on all constitutional questions relating to the character of state governmental organization." 12 L.Ed.2d at 539. But we have positive proof that Congress *was* passing on the constitutionality of the franchise provisions in the Texas Constitution, because the Act of Congress readmitting Texas expressly exacted as a condition for readmission that "the Constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution herein recognized," except as punishment for crimes, etc. How could there be clearer evidence that Congress had assumed to pass on the franchise provisions of the Texas Constitution in the light of the Fourteenth Amendment and had concluded that they did not offend its terms? The Court's observations on congressional scrutiny of apportionment provisions are not applicable to the present case.

In *Mabry v. Davis,* 232 F.Supp. 930, 938 (W.D. Tex. 1964), which is now in process of being appealed to this Court, the District Court's answer to this argu-

ment was the statement in *Reynolds* that "Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights." But this answer overlooks the point of Respondent's argument, which goes to the *construction and scope of the Equal Protection Clause*. In *Reynolds*, the Court was not addressing its comments to the effect of a *contemporaneous* construction. We say that this contemporaneous construction by the Congress shows that the Equal Protection Clause, when adopted, was either intended not to apply to state franchise provisions or, if applying, was intended not to invalidate a provision such as we have in this case; that this intent fixed the scope of the Equal Protection Clause; and that its scope remains today the same as it was when adopted.

III. Validity of the Restriction on Place of Voting, as Tested by the Equal Protection Clause

A. *Introduction; statement of general rule.*

If the Equal Protection Clause applies to "voting rights,"[3] the validity of state action with respect thereto is to be tested by the same standard as in other matters.

The power of each state to determine who shall constitute its electorate, subject only to specific restrictions

[3]Although the phrase "voting rights" is sometimes used in this brief, it should be borne in mind that voting is a *privilege* and not a *right*. Moreover, it is not a privilege springing from citizenship of the United States, but from the laws of each individual state. It has been so declared both by this Court and by the Texas courts. *Minor v. Happersett*, 21 Wall. (88 U.S.) 162 (1875); *Pope v. Williams*, 193 U.S. 621 (1904); *Solon v. State*, 54 Tex. Crim. 261, 114 S.W. 349 (1908); *Savage v. Umphries*, 118 S.W. 893 (Tex. Civ. App. 1909); *Koy v. Schneider*, 110 Tex. 369, 221 S.W. 880 (1920).

in the United States Constitution, has been confirmed by this Court many times. It was stated in *Pope v. Williams*, 193 U.S. 621 (1904), and in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). It was reiterated most recently in *Gray v. Sanders*, 372 U.S. 368 (1963).

Pope v. Williams involved the validity of a state law which required that a person coming into the state with the intention of residing there must have registered his name with the clerk of the circuit court of the proper county, thereby to indicate his intent to become a citizen and resident of the state, at least a year before he would be eligible to register as a voter. In upholding the validity of the statute, the Court said (193 U.S. at 632):

> "The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett*, 21 Wall. 162, 22 L.ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor v. Happersett*, 21 Wall. 162, 22 L.ed. 627, such persons were allowed to vote in several of the states upon having declared their intentions to become citizens of the United States. Some states permit women to vote;

other refuse them that privilege. *A state, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote,* as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the Federal Constitution, already stated; * * * ." (Emphasis supplied.)

In *Lassiter,* which upheld the power of a state to impose a uniform literacy requirement upon its voters, the Court said (360 U.S. at 50, 51):

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, Pope v. Williams, 193 U.S. 621, 633, 24 S.Ct. 573, 576, 48 L.Ed. 817; Mason v. State of Missouri, 179 U.S. 328, 335, 21 S.Ct. 125, 128, 45 L.Ed. 214, absent of course the discrimination which the Constitution condemns.
>
> "* * *
>
> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (Davis v. Beason, 133 U.S. 333, 345-347, 10 S.Ct. 299, 301-302, 33 L.Ed. 637) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. * * *".

In *Gray v. Sanders,* 372 U.S. at 379, the Court said:

"States can within limits specify the qualifications of voters in both state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, § 2. As we held in Lassiter v. Northampton County Election Board, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed. 2d 1072, a State may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group. But we need not determine all the limitations that are placed on this power of a State to determine the qualifications of voters, for appellee is a qualified voter."

If the Equal Protection Clause of the Fourteenth Amendment sets limits within which the state must act in specifying qualifications of voters, what are those limits? The rule for testing validity of state action under the Equal Protection Clause is summed up in the following quotation from *McGowan v. State of Maryland,* 366 U.S. 420, 425 (1960):

"* * * Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The question, then, is whether the classification is reasonable: do persons in military service constitute a

class which may properly be treated differently from other persons? In testing its reasonableness, the classification should not be viewed from the standpoint of what the Court, exercising an independent judgment, would have considered reasonable, but should be upheld "if any state of facts can reasonably be conceived to sustain it."

Military status has served as a basis for classification in many types of legislation. We have, for example, the Soldiers' and Sailors' Civil Relief Act. We have military personnel subjected to the jurisdiction of military courts, not only for infringements of regulations which go to the performance of their military duties but also for crimes that have nothing to do with those duties. We had an example of classification of military as opposed to civilian in a provision of the Texas Constitution back during World War II and continuing up until 1954, which waived payment of the poll tax as a condition for voting by members of the armed forces. Many states make special provisions for servicemen in registering to vote. In former days, it was not uncommon for state laws to limit absentee voting to persons in military service, and this is still the situation in a few states. These absentee voting laws have been sustained against claims of invalidity as class legislation, and so far as we have found no court has ever held such a law to be invalid on this ground. See Notes, 14 A.L.R. 1256, 1265, 132 A.L.R. 374, 375.

We mention these examples by way of pointing out that classification of the military on the one hand and the civilian on the other is nothing new in the law. Many of the laws making special provisions for servicemen are favorable to them, but the Equal Protection

Clause is a two-way street, prohibiting invidious discrimination both in favor of and against individuals or classes of individuals. The justification for the classification in each instance is that there are inherent characteristics of military service which distinguish the soldier[4] from the civilian. We turn our attention now to a consideration of the characteristics which make the classification a reasonable one for regulation of place of voting.

B. *Purpose and reasonableness of the restriction on place of voting.*

The Supreme Court of Texas interpreted the purpose of the restriction in the Texas law which limits place of voting to persons in military service as being "to prevent a concentration of military voting strength in areas where military bases are located." (R. 22.) That interpretation is binding on the federal courts, irrespective of the nature of the evidence upon which the state court based its finding. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 99 (1952). We might add, however, that the state court had before it ample evidence for this finding, in the form of declarations by the sponsor of the amendment in the Texas Legislature and other documentary evidence showing that the Legislature intended this to be the purpose when it proposed the amendment and that the people so understood its purpose when they adopted it. This evidence was presented without objection from Petitioner in the brief filed by Respondent in the court below.

A concentration of military voting strength in a

[4]In this brief the word "soldier" is used as a generic term embracing members of all branches of military service.

community poses two possibilities which the State of Texas deems to be inimical to the public welfare. The first is that control of community affairs will be dominated by the military, which could come about by pressure or persuasion of military commanders or by the cohesion which exists among the members of a military organization. The second possibility is that the balance of power in community affairs will rest with a group whose members are, in the final analysis, only temporary residents of the place where they are stationed and who might lack a proper understanding and concern for the best interests of the community.

The desire to avert the first possibility is but a manifestation of a deep-rooted fear of military domination which has permeated our state and national governments throughout the history of this nation. As a result of this fear, the constitutions of 49 states contain provisions declaring the principle of subordination of military authority to civil authority.[5] In an address delivered in 1962, which is published in 37 New York University Law Review 181, Chief Justice Warren observed, at pp. 183 and 185:

> "It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existence. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. * * *

[5]See *Index Digest of State Constitutions* (2nd ed. 1959), p. 697, published by Legislative Drafting Research Fund of Columbia University. The provision in the Texas Constitution, Art. I, Sec. 24, reads: "The military shall at all times be subordinate to the civil authority."

"Civil supremacy has consistently been the goal of our government from colonial days to these. As late as 1947, when the Department of Defense was established, Congress specifically provided for a civilian chief officer. And when President Truman asked the Congress for an amendment to make an exception for a soldier and statesman as great as the late George C. Marshall, serious debate followed before the Act was modified to enable him to become Secretary of Defense, and then only by a small majority of the total membership of the House and less than half of the Senate. Those who opposed the amendment often expressed their high regard for General Marshall, but made known their fears concerning any deviation, even though temporary, from our traditional subordination of military to civil power.

"The history of our country does not indicate that there has ever been a widespread desire to change the relationship between the civil government and the military; and it can be fairly said that, with minor exceptions, military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but that they have also cheerfully cooperated in preserving it.

"Thus it is plain that the axiom of subordination of the military to the civil is not an anachronism. Rather, it is so deeply rooted in our national existence that it must be regarded as an essential constituent of the fabric of our political life."

This first type of situation which the restriction is designed to avert is less likely to occur than the second, but it is by no means so remote that it should be written off as failing to provide a reasonable basis for the state's action. In fact, the present amendment has evolved from a threat to civil authority in the early

history of Texas. Its background is related in the following quotation from "History of Texas Election Laws," by Abner V. McCall, Dean of the School of Law, Baylor University, 9 Vernon's Annotated Texas Statutes, p. XVII, published in 1952:

> "The Second Congress [of the Republic of Texas] in 1837 enacted the first election law * * *.
>
> "This first act contained a novel section providing 'that regular enlisted soldiers and volunteers for during the war, shall not be eligible to vote for civil officers.' This provision was no doubt inspired by the mutinous conduct of the nonresident volunteers who had been recruited in the United States after the Battle of San Jacinto. They had defied the provisional government and on one occasion in July, 1836, had sent an officer to arrest President David G. Burnett and his cabinet to bring them to trial before the army. They had continued their rebellious conduct after Sam Houston became the first president under the Constitution of 1836. It was not until May, 1837, that Houston was able to dissolve the army and eliminate this threat to civil authority. This provision disfranchising soldiers in the regular army was placed in the 1845 Constitution of the State of Texas and has remained in each succeeding constitution. It was modified in 1932 to exempt the National Guard and reserve and retired officers and men."

The 1932 amendment was replaced in 1954 by the present provision (R. 21).

Burned as a child, Texas has continued to be wary of the fire—more so than the majority of her sister states. The law in other states is discussed at a subsequent point in this brief, but let us say here that the fact that some states have not taken steps to counter-

act a threatened danger does not make unreasonable the laws of other states that have dealt with it. Nor is it necessary to the validity of this purpose that the state show a likelihood of occurrence at every election, or once in ten years, or in twenty or fifty years—if likely to occur at all, the occurrence is so grave that the state may protect itself against the possibility.

Two hypothetical examples will serve to illustrate that this threat of military domination is not just an illusion. Instances have been known where a feud has developed between the local police on the one hand and the commander of a military base and his men on the other hand. Suppose an election for city officers is coming up, and the commander sees a good chance to have the chief of police ousted by changing control of the city council. It would not be difficult for the commander to find ways to persuade or induce the voting members of his command to cooperate—in fact, in these circumstances they would probably be only too happy to do so, in view of the loyalty to his commanding officer and to his military organization which is instilled into every soldier.

Another example leads into the realm of ideologies, and here again history gives us occurrences which show that this is not a farfetched possibility. Suppose a military commander having strong views about America and its institutions, how the nation should be preserved and how its future should be guided, objects to what some of the teachers are teaching in the local school system and decides to attempt to influence a school trustee election for the purpose of changing what is going on in the schools. It would be naive to think that a strong-willed, determined commander

could not exert his influence in various ways, both open and subtle. And what would that be but subjection of civil authority to military authority, where the military authority was able to control the votes which would determine the outcome of the election and would thereby dictate the policy of the community?

In *Mabry v. Davis, supra,* 232 F.Supp. at 937, the Court has noted that federal law prohibits an officer from attempting to influence a person's vote. But does this law protect against the indirect influence which may be exerted in numerous ways? Furthermore, regardless of the officer's accountability for his acts under federal law, a completed election would not be reversible because of his culpable behavior.

The second type of hazard does not involve concerted action of the military as a group, but does arise from a characteristic of military service—that persons in service constitute a mobile population, usually remaining in the same place not longer than two, three, or four years and always subject to being ordered to some other place.

Petitioner avers an intent to make El Paso his permanent home, but such an intent is not required in order for a person to establish legal residence. The essentials for acquiring domicile are stated in *Ellis v. Southeast Construction Co.,* 260 F.2d 280, 281 (8 Cir. 1958) as follows:

> "Generally speaking, in order '[to] acquire a domicil of choice, the law requires the physical presence of a person at the place of the domicil claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicil is instantaneous. *Intention*

to live permanently at the claimed domicil is not required. If a person capable of making his choice honestly regards a place as his present home, the motive prompting him is immaterial. Restatement of Conflict of Laws, §§ 15, 22.' Spurgeon v. Mission State Bank, 8 Cir., 151 F.2d 702, 705-706, certiorari denied 327 U.S. 782, 66 S.Ct. 682, 90 L.Ed. 1009." (Emphasis supplied.)

Thus, all that a soldier must be able to show in order to establish residence at his present "permanent station"* is that he does not intend to go back to the place last claimed as his home and that he intends to remain at his present station until ordered elsewhere. Every person assigned to a permanent station is a potential resident of the community where he is stationed. The burden is on Petitioner to show that the percentage of military personnel who do claim residence at the place where they are stationed is so slight as to create no hazard in voting.

The soldier who is in service only for the purpose of fulfilling compulsory military duty is not likely to establish residence where he is stationed, but the bulk of military personnel consists of persons voluntarily in service for a longer duration. As in the case of Petitioner, after several years away from their original home they may no longer care to return. They have no permanent home; home to them is where they are living. And that is the place which they very likely would list as their residence.

The practice of claiming residence at whatever place

*In the District Court opinion in *Ellis*, 158 F. Supp. 798, 800, "permanent station" was explained to mean a station to which one's family may be brought at government expense and where he may reasonably expect to remain for a material period of time.

the soldier is stationed, without his possessing an intent to make it his permanent home, is illustrated in the *Ellis* case. The plaintiff, a resident of Arkansas at the time he entered service in 1939, had been in service for nearly 19 years and intended to retire upon completion of 20 years. He was then stationed at Barksdale Field, Shreveport, Louisiana, and was claiming domicile there, testifying in support of his claim that he intended to make it his permanent home and to continue to live there after retirement. As to claimed residence during the previous 18 years, it is stated in the opinion (260 F.2d at 282):

> "* * * Plaintiff stated that the last time he declared Arkansas to be his home was when he re-enlisted in 1945. For a period of seven years immediately prior to the Korean conflict, plaintiff and his family lived at Tampa, Florida, and while stationed there he re-enlisted two times, and on each occasion declared Tampa as his home. Plaintiff was stationed at Rapid City, South Dakota, from January, 1953, to July, 1955, and at Salina, Kansas, from July, 1955, to March, 1956. Since March 28, 1956, plaintiff and his family have resided in Louisiana, * * *."

Under the rule stated by the Court (which accords with the law of residence as interpreted by the Texas courts), the plaintiff would have been a bona fide legal resident, for the time, of each of the places which he had claimed to be his residence.

The rationale for excluding military personnal from voting at the place where they are stationed, on the ground that they are a mobile population, is that because of the impermanence of their residence they may lack knowledge of and interest in the affairs and needs

of the community which a voter should have. Lack of knowledge and interest is accepted in all jurisdictions as a proper ground for withholding the voting privilege, in the requirement that the voter be a citizen and in the requirement that the citizen must have resided within the state and within the county, city, or election precinct for certain lengths of time before he is eligible to vote.[7] Until a citizen has fulfilled these requirements, he is denied the right to vote in any election, and he has also lost his right to vote at the place of his former residence. In short, he is disfranchised during this period.

The length-of-residence requirement is justified on the ground that it "affords some surety that the voter has in fact become a member of the community and that, as such, he has a common interest in all matters pertaining to its government and is therefore more likely to exercise his right intelligently." *Wright v. Blue Mountain Hospital District,* 214 Or. 141, 328 P.2d 314, 318 (1958). Every state excludes a person from voting unless he is domiciled in the state, regardless of how long he has been an actual "temporary" resident. Although the law permits a soldier to claim legal residence at the place where he is stationed, he can never really be anything but a temporary actual resident throughout his military career, because he is always subject to transfer. The same rationale which supplies the reasonableness of the exclusion in the case

[7]Twelve states require a state residence of six months, 36 states require a residence of one year, and two require a residence of two years. *The Book of the State, 1964-1965,* p. 24, published by The Council of State Governments. Within the last few years, 15 states have enacted laws which reduce or eliminate the length-of-residence requirement for voting in presidential elections.

of general residence requirements support the reasonableness of the present exclusion.

Residence requirements and the present restriction are both applications of the general principle stated in the following quotation from *Savage v. Umphries,* 118 S.W. 893, 899 (Tex.Civ.App. 1909):

> "Who shall exercise suffrage is a fundamental question, which the body politic must decide upon a just view of the true relation between the power of the suffragans and the rights of the whole people. Hence the exercise of the elective franchise is not a natural or God-given right, but is, as the word 'franchise' implies, a right conferred by the state or body politic. In other words, as is said by an eminent authority on constitutional law, the questions whether one is fitted by intelligence to perform the function of an elector, or has such interests is the matters controlled through his suffrage as to check the misuse of power which self-interest prompts, *or has such community of interest in the laws which are to govern the community, which should fit him for the discharge of the duties of a suffragan,* must be determined by the body politic. 'If he lacks intelligence, it is the greatest absurdity to give him the suffrage, and the greatest wrong to the community. *If he lacks community of interest in the laws which are to govern the community, it is not only a serious danger, but a false principle, to give it to him, for thus you give power to the hand which is alien to the rights of others which it controls.*' Tucker on the Constitution, 89." (Emphasis supplied.)

The temporary nature of the soldier's residence at his duty station was the ground on which the majority of the Supreme Court of Texas found a reasonable basis for excluding him from the privilege of voting at that place. The Court said (R. 22):

"Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence. They are residents in a particular place for a particular period of time under compulsion of military orders; they do not elect to be where they are. Their reasons for being where they are, and their interest in the political life of where they are, cannot be the same as the permanent residents. This is not to say that military personnel are any less citizens; it is to say that military personnel in the nature of their sojourn at a particular place are not, and cannot be, a part of the local community in the same sense as its permanent residents. Denying to such personnel the right of suffrage in the place where they may be stationed—while in no sense denying the exercise of such right in their place of original residence—is not unreasonable and the classification established is nondiscriminatory. The voting restrictions operate alike upon all members of the class."

We will give two examples to illustrate the public policy back of this motivating reason for the restriction. In Texas, whether intoxicating liquors may be sold in a given area is determined by "local option" elections held in individual counties, cities, or justice precincts upon petition of voters residing in the affected territory.[8] Within the State of Texas there are large military bases located in traditionally "dry" areas. Some of the communities in which the personnel from these bases live are small-town or semi-rural. Suppose an election was called on the question of legalizing the sale of liquor. If servicemen were allowed to vote, it is not unreasonable to assume that their vote might determine the outcome of the election. We would

[8]Vernon's Texas Penal Code, Art. 666-32. Each county is divided into not less than four nor more than eight justice precincts. Tex. Const. Art. V, Sec. 18.

predict that if a public opinion poll were taken, it would show a general feeling in these communities that the likelihood of carrying the proposition would be greatly enhanced by permitting servicemen to vote.* As applied to elections of this nature, the restriction evidences a public policy to leave the determination of questions affecting the habits, mores, and traditions of the community to the permanent civilian population, rather than to allow it to be determined by a group of persons who have been brought up under differing sets of mores and who are here today but likely to be gone within a short space of time. Can it be said that this is an arbitrary policy, unrelated to a proper object of public welfare or interest?

Let us digress to answer Petitioner's assertion, on page 9 of his brief, that there is "no proof that there is any such area where the military voting strength would control the local politics." First, whether such an area does exist at this moment is unimportant, if it is possible for such an area to exist. There do exist in the State of Texas a number of areas wherein the number of military voters might reasonably be expected to outnumber civilian voters if the present deterrent to establishment of legal residence were removed. There was no opportunity for introduction of evidence of

*In September, 1964, following the decision in *Mabry v. Davis, supra,* holding this restriction on voting to be in violation of the Equal Protection Clause, the writer of this brief received a call from a resident of the justice precinct in which Bergstrom Air Force Base is located in Travis County, near Austin, wanting to know if servicemen could now vote in Texas. He explained that if the servicemen could vote, he and others were interested in petitioning for an election to legalize the sale of liquor in that precinct. Bergstrom is under the Strategic Air Command, which has a three-year rotation policy.

this nature in the lower court, but it can be found in census reports and other official records of which this Court can take judicial notice. Secondly, the validity of the purpose does not demand the possibility of a greater number of military voters than civilian voters, but requires merely the possibility that the balance of power would rest with the military voters.

A second example where the impermanence of residence might well prevent the serviceman from having the "community of interest" that voters should possess is in bond elections for local improvements. It is not uncommon for married soldiers to buy a dwelling house at the places where they are stationed and to sell when they are transferred.[10] Suppose there is an election to authorize issuance of bonds for long-range improvements. Authorization of the bonds will mean an immediate raise in property taxes. The serviceman who expects to remain in the community for no longer than two, three, or four years may not care what the community is like five or ten years from then. Can it be said that there is no reasonable basis for seeking to prevent the hamstringing of community progress by persons in that status?

There are in Texas several large military bases with normal strength of 10,000 to 40,000 men, and there is a strong likelihood that the outcome of many elections would turn on the military vote. Here again, the fact that most of the other states have not taken steps to

[10] In *Ellis v. Southeast Construction Co.*, 158 F. Supp. 798, 804 (W.D. Ark. 1958; reversed 260 F. 2d 280), the Court noted the plaintiff's testimony in that case that an estimated ten to fifteen percent of married noncommissioned officers of his own rank (technical sergeant) were accustomed to buying instead of renting.

prevent this occurrence, or that they are willing to tolerate it, does not render the Texas law invalid. States frequently have different concepts of what is best for the public welfare. Some states allow gambling, others do not; some allow branch banking, others do not; some require plumbers to be licensed, others do not—and so on. The Texas law cannot be held invalid unless there is no conceivable justification for the public policy which this restriction expresses.

In *Mabry v. Davis,* 232 F.Supp. at 936, the District Court expressed the belief that present election laws of Texas "provide sufficient safeguards to make it highly unlikely that the balance of voting power between the military and civilian in this state will be substantially altered by a removal of the ban against those who enter military service from another state."[11] The Court mentioned in particular the statutes which permit challenge of a voter's qualifications when he registers and when he offers to vote. We do not see this as a protection against either of the hazards we have discussed. As to all those voters who in good faith stated an intent not to return to the place formerly called home, the challenge could not be sustained. For those who were not entitled to claim a new residence because they still had ties with some other place which bound them to it as residents of that place, it is not likely that a tax collector or an election judge would have these facts within his knowledge and hence would have no ground for making or sustaining the challenge.

[11]In *Mabry,* as in the case now before this Court, the suit was brought by persons who entered service as residents of another state. It should be kept in mind that the provision operates alike upon persons who entered as residents of Texas and those who entered as residents of other states. (R. 23.)

As already pointed out, the burden is on Petitioner to prove the unreasonableness of the classification. This action was brought as an original mandamus proceeding in the Supreme Court of Texas. That Court does not hear evidence, and jurisdiction in original proceedings is entertained only when there are no disputed fact issues involved in the case. In these circumstances, Petitioner did not have the opportunity to adduce evidence that he would have had if the suit had been filed in a trial court, but his choice of forum does not relieve him of the burden of proving absence of any factual basis to justify the classification.

Petitioner has offered no evidence to refute the reasonableness of the classification, and he has offered no decision of this Court which supports his claim of invalidity.

Petitioner relies on statements made in recent apportionment cases decided by this Court. (Petitioner's Brief, pp. 12-13.) We preface our reply to this portion of the brief with a quotation from Mr. Justice Stewart's dissenting opinion in *Lucas v. The Forty-Fourth General Assembly of the State of Colorado,* 12 L.Ed.2d 581 (1964):

> "It is important to make clear at the outset what these cases are not about. They have nothing to do with the denial or impairment of any person's right to vote. Nobody's right to vote has been denied. Nobody's right to vote has been restricted. Nobody has been deprived of the right to have his vote counted. The voting right cases which the Court cites are, therefore, completely wide of the mark. Secondly, these cases have noting to do with the 'weighting' or 'diluting' of votes cast within an electoral unit. The rule of *Gray v. Sanders,* 372

U.S. 368, is, therefore, completely without relevance here. * * *"

Conversely, the apportionment cases are not apposite to this case. The statements relied on by Petitioner were made in a context involving an entirely different question from the one here involved, and they cannot be transferred to a new context without proper consideration of the changed legal questions.

Petitioner quotes the statement by Chief Justice Warren in *Davis v. Mann* that "discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." The key phrase there is "without more being shown." In the present case, we submit that a reasonable and valid basis for the discrimination has been shown.

The key word in the quotation from Mr. Justice Black's opinion in *Wesberry v. Sanders* is an *unnecessary* abridgment of the right to vote. The key phrases in the quotations from Mr. Justice Clark's opinion in *Wesberry* and Chief Justice Warren's opinion in *Reynolds* are *"qualified* citizens" and *"qualified* voters." If there is a reasonable basis for restricting the right in the interest of the public welfare, the suffrage has not been abridged unnecessarily and persons coming within the restriction cannot be called "qualified voters."

Petitioner relies on *Gray v. Sanders* as supporting his contention. That case dealt solely with the weight to be given to the vote of a qualified elector, and the power of the state to give the vote of some of its electors greater effect than that of others. It had nothing to do

with the state's power to determine who are its qualified electors. The Court made this clear by pointing out that it did not need to determine in that case the limits of the state's power to specify the qualification of voters, because plaintiff was a qualified voter, and then by stating the rule of the case:

> "* * * But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." 372 U.S. at 381.

C. *The restriction on place of voting is not a denial of voting rights.*

Every state and territory of the United States permits its residents to maintain residence during absence in military service, and if a resident is a qualified elector under the laws of the state, he may vote in its elections. And the privilege of voting in the state of residence at the time of entering service may be effectively carried out, because every state and territory except Puerto Rico has laws providing for absentee voting by persons absent in military service. See *Voting Information 1964,* Pamphlet DoD Gen-6, published by Armed Forces Information and Education, U. S. Department of Defense.

Thus, it is seen that any serviceman who is left without a place to vote finds himself in that condition by his own volition in choosing to change his place of legal residence. We submit that a serviceman does not suffer any substantial injury by being required to maintain his legal residence at the place where he entered service in order to preserve voting privileges. We submit, further, that a state may deny to persons in military serv-

ice the power to acquire a domicile while serving under orders which make them subject to transfer at any time. But Texas does not go that far. She permits the person in military service to become a legal resident for all purposes except voting, thereby being able to escape the burdens which might have been imposed on him by the state of his former residence (e.g., state income tax)[12] and to acquire privileges for himself or members of his family which the State of Texas accords to its residents. The fact that Texas allows a person, present within the state under circumstances which ordinarily would not vest him with the status of a resident, to acquire that status by the exercise of his free choice, should not prevent the state from restricting and regulating the privileges accompanying a residence so acquired.

On page 8 of his brief, Petitioner makes the following statement:

> "* * * [U]nder the facts of this case, since the Petitioner was only 18 years of age when he originally entered the service, in all probability he never had an opportunity to establish a voting residence prior to entering the service. If all states had the same constitutional provision as Texas, Petitioner most certainly could not have acquired a voting residence in any state since entering the service in 1946."

In this argument, Petitioner makes the false assumption that a person must have been of voting age, and actually a voter, at the time he entered service in order to vote in the state of which he was a resident at the time he entered service.

[12]Thirty-five states and the District of Columbia levy a personal income tax. Texas does not have a state income tax. Commerce Clearing House, *State Tax Guide*, p. 1501.

Petitioner entered service as a resident of Alabama. As in every other state of the United States, the law of Alabama permits a person in military service to retain his residence in that state during the period of his service, regardless of his absence. The pertinent provisions of the Alabama law are set out on the next page of this brief. If Petitioner had chosen to retain his residence in Alabama, that state would have recognized him as a resident although he was absent in military service, and after he became 21 years old he could have voted there.

Petitioner further states, on page 8 of his brief, that so far as he can ascertain, Texas is the only state in the United States which denies voting privileges to a legal resident of the state solely for the reason that he is in the military service." We do not dispute that a majority of the states permit military personnel to acquire a voting residence under certain circumstances. But Texas is not alone in denying the privilege. Although we consider it unessential to the validity of the Texas law, we call the Court's attention to the laws of a number of states which apparently do have the same effect.

Alabama Code, 1940 (Recompiled 1958), Tit. 17,

---

[11]In *Mabry v. Davis*, 323 F.Supp. at 937, footnote 15, the District Court referred to a stipulation in that case that if called as a witness the Voting Officer of the Department of the Air Force would testify: "The State of Texas is the only state in the union which will not permit an otherwise eligible member of the Armed Forces of the United States to acquire legal domicile, for the purpose of voting, upon demonstration of intent to do so, and upon fulfillment of state requirements of residence * * *." Defendants in that case agreed to the stipulation in order to eliminate the necessity of calling witnesses at the hearing, but they disputed the accuracy of the statement and put into evidence the laws of the various states to refute it.

Sec. 17." "No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; *neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in the state.*" (Emphasis supplied throughout these quotations.)

Georgia Constitution, Sec. 2-702. "Paragraph II. Who shall be an elector entitled to register and vote.—Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: *Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.*"

Indiana Constitution, Art. 2, Sec. 3. "No soldier, seaman or marine, in the army or navy of the United States, or of their allies, shall be deemed to have acquired a residence in the State, in consequence of having been stationed within the same; *nor shall any such soldier, seaman, or marine have the right to vote.*"

Kansas Constitution, Art. V, Sec. 3. "For the

[14]A footnote to this section in the edition published by The Michie Company states that this section is superseded as to Jefferson County, citing § 330 (249h) of Title 62. The Attorney General of Alabama has informed us that this is a printer's error and there is no such section.

purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas, nor while a student of any seminary of learning, nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison; and the legislature may make provision for taking the votes of electors who may be absent from their townships or wards, in the volunteer military service of the United States, or the militia service of this state; *but nothing herein contained shall be deemed to allow any soldier, seaman or marine in the regular army or navy of the United States the right to vote.*"

Nevada Constitution, Art. 2, Sec. 3. "The right of suffrage shall be enjoyed by all persons otherwise entitled to the same who may be in the Military or Naval service of the United States; *provided, the votes so cast shall be made to apply to the County and Township of which said voters were bona-fide residents at the time of their enlistment,* * * *.*"

Oregon Constitution, Art. II, Sec. 5. "No soldier, seaman, or marine in the Army, or Navy of the United States, or of their allies, shall be deemed to have acquired a residence in the state, in consequence of having been stationed within the same; *nor shall any such soldier, seaman, or marine have the right to vote.*"

Although permitting military personnel to acquire legal residence while living off the post, many states prevent a person in military service from acquiring legal residence while he is living on a military post. See Note, 21 A.L.R.2d p. 1173. This rule is stated as

follows in Restatement, Conflict of Laws, § 21, Comment (c):

> "A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, cannot acquire a domicil there though he lives in the assigned quarters with his family; for he must obey orders and cannot choose to go elsewhere. If, however, he is allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duty, he can acquire a domicil where he lives."

This seems to be making a distinction without a valid substantive difference. In both cases, the soldier's presence in the community is by virtue of his having been ordered to duty in that locality. Of what significance is it that he is required in one case to live within the confines of a certain area? It is submitted that all of these laws denying a right to acquire legal residence are also within the ambit of Petitioner's attack on the Texas law.

D. *The classification is not invalid because it fails to cover other areas of possible evil.*

The dissenting opinion in the Court below contains this language (R. 30):

> "With present day mobility and industrialization, large groups, *other than servicemen,* move into the various communities of this state for limited stays, and establish voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact.
>
> "Wherein lies the reasonable basis for distinguishing between these groups?"

The answer to this query is two-fold: (1) There are substantial distinguishing characteristics, and (2) failure to cover every individual or group of individuals who might pose a similar threat to the public welfare does not invalidate the classification.

The reference obviously is to persons who go to major construction areas for the purpose of taking part in the construction rather than those who go there to utilize the facilities which have been constructed. As to the latter, their intention is to become permanent residents. Nor is the proposed analogy appropriate to persons in construction trades who are drawn to a growing community because work prospects are good. The growth is likely to continue over a long period of time, perhaps indefinitely, and these persons ordinarily would intend to remain there permanently. The fact that an unanticipated change in economic conditions might impel them to change residence at some unpredictable future time would make them no less permanent residents so far as their attitudes and interests in the community were concerned. The reference apparently is to workers on major construction projects.

As to persons who enter a community to engage in major construction projects and who intend to remain only until the project is completed, the following factors distinguish them from the military:

(a) Very few construction projects are of such duration that it would induce the workers to claim residence at that place or would require them to remain there for any substantial period beyond that required to become qualified voters at that place. In other words, the likelihood of claimed residence and voting is smaller. The soldier's sojourn is temporary, too (which, as

noted, is one ground for withholding voting privileges at that place), but ordinarily he would remain from two to four years at each permanent station. Furthermore, construction companies have fixed permanent locations to which their employees feel attached, whereas ordinarily a military unit has no permanent "home base." This difference also reduces the likelihood of claimed residence at the work site.

(b) Very few construction projects are of such magnitude as to require so many workers that the ratio of "temporary" residents to permanent residents would be substantial. On the other hand, large military bases are frequently located in the neighborhood of small towns and in relatively sparse population areas.

(c) Construction projects are one-shot propositions, whereas military bases have some degree of permanence. Although the personnel at a base is in a continual state of change, the base itself remains, and the community would be subject to a continual threat from the military vote.

(d) There is not the same degree of cohesion among members of a construction crew as exists among military groups, and they are not subject to the same degree of coercion or control by superiors. Consequently, they are less likely to act as a group.

(e) A construction worker is free to sever his employment with the construction company and remain in the community if he desires to do so, whereas a soldier does not have that privilege.

Other differences could also be mentioned, but these suffice to demonstrate the dissimilarity of the two groups.

But even if the analogy held, the provision should not be struck down because of failure to place a similar restriction on the other group. A classification is not rendered invalid by failure to cover "the whole field of possible abuses" and will not be overturned because it does not extend to all subjects which legitimately might be included. *Carroll v. Greenwich Insurance Co.*, 199 U.S. 401, 411 (1905); *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160 (1912); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1936). Numerous other cases are cited in 12 Am. Jur., Constitutional Law, § 484, pp. 160-163, and 16A C.J.S., Constitutional Law, § 499, pp. 250-251.

Mabry mentions that the wives of servicemen are not precluded from voting at the place where their husbands are stationed. 232 F.Supp. at 938. If this comment is by way of suggesting that the restriction on servicemen is invalidated by failure to include the wives; the rule just cited also answers that criticism.

E. *The classification is not invalid because it results in some inequities.*

Thus far our discussion has been directed to the restriction as applied to the whole class of military personnel. Petitioner makes a plea of inequity as applied to him individually, by cataloging facts in his case which set him apart from the general class of servicemen who might claim a voting residence at their duty station if the restriction were removed. He has been in service for almost 20 years and is already looking to the time when he will retire. He and his family have chosen El Paso as the place where they want to "settle down," and they are already putting down roots to

become permanently a part of the community where they now live. Petitioner has bought a home and a small business, and his family would remain in El Paso if he were transferred to some other station.

Is this typical of persons in military service? What percentage of the men who are stationed at the White Sands installation where he serves have similar purpose? Is it usual among military personnel generally that most of them intend to remain permanently at the place where they are stationed, and could they do so even if they so desired? Common knowledge bears witness to the contrary. The record is silent as to where Sergeant Carrington served during the years from 1946 to 1962, or as to what place or places he claimed to be his residence during that time. But the fact that during 16 years of his career he was stationed at places where he did not intend to live permanently demonstrates that his present situation is not typical of servicemen generally.

Respondent takes the position that the restriction on place of voting is not unreasonable as applied to Petitioner individually. The first type of hazard which the restriction is designed to prevent—concerted action by a military group—is not removed by any of these special circumstances.[15]

[15]Petitioner performs his military duties at White Sands, New Mexico, but resides in El Paso. Petitioner's attorney has informed counsel for Respondent that Petitioner travels to the military base on the days that he is on duty, returning to his residence in El Paso at night. He has stated further that a considerable number of other military personnel assigned to duty at White Sands also live in El Paso. Additionally, there are several military installations located in El Paso County, in the vicinity of El Paso, and as of June 30, 1962, there were 24,732 military personnel assigned to these installations. This information was furnished by the Assistant Secretary of Defense.

As to impermanence of residence, although Petitioner might *wish* to remain in El Paso, so long as he is in military service he is subject to being sent elsewhere. Although he asserts that he "voluntarily selected Texas to be his permanent home," his presence there *at this time* is directly related to his being in military service: he is living in El Paso because his military station is near enough to permit him to do so. Although he has some leeway as to the exact locale, he is living in El Paso only because military orders have assigned him to a station in that area. He is continuingly subject to military orders which may take him hundreds of miles from El Paso, and which may keep him away from El Paso throughout the remainder of his military career. He may intend to make El Paso his permanent home after he retires from service, and as to that future time he is free to exercise his choice; but as to the present, where he lives is subject to the superior will of military authority. So long as he is in military service, it would not be unreasonable to say to him, "You cannot establish a *present* domicile in El Paso and you cannot claim any of the privileges of domicile at this time, because you are not free to choose where you live." *A fortiori,* it is not unreasonable to withhold part of the privileges of domicile until he becomes in fact a permanent resident.

But even if it should be conceded that Petitioner shows special "equities" that set him apart from the general class of military personnel, that does not render the retriction invalid as to him. The reasonableness of the classification is not to be tested by the isolated example, and the classification does not fail merely because it results in some inequity. *Lindsley v. Natural*

Carbonic Gas Company, 220 U.S. 61, 78 (1911); *Second Employers' Liability Cases*, 223 U.S. 1, 53 (1912); *Phelps v. Board of Education*, 300 U.S. 319, 324 (1937); *Spahos v. Mayor & Councilmen of Savannah Beach, Ga.*, 207 F. Supp. 688, 692 (S. D. Ga. 1962, affirmed 371 U.S. 206). A host of other authorities are collected in 12 Am. Jur., Constitutional Law, § 483, pp. 158-159, and 16A C.J.S., Constitutional Law, § 490, p. 251. The principle is well put in *Louisville & N. R. Co. v. Melton*, 218 U.S. 36, 54 (1910), wherein it was contended that a state statute modifying the doctrine of fellow servant as applied to railroad employees was invalid because it applied to all such employees. It was argued that the statute could be valid only if it were made to apply solely to employees exposed to dangers peculiarly resulting from the operation of a railroad, "thus affording ground for distinguishing them for the purpose of classification from coemployees not subject to like hazards or employees engaged in other occupations." The Court rejected this argument in the following language:

> "* * * In other words, reduced to its ultimate analysis the contention comes to this; that by the operation of the equal protection clause of the Fourteenth Amendment the States are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the

assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the States contrary to the doctrine maintained by this court without deviation. This follows since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a State to classify will make the error of the contention apparent."

We submit that as to the whole class of which Petitioner is a member, the restriction on place of voting is reasonable and just, and the fact that a few inequities may result does not invalidate the classification. If Petitioner seeks to set himself apart from the class, it is incumbent upon him to prove that there is a sufficient number of others similarly situated, within the general class, as to render the classification invalid for being broader than permissible. This he has wholly failed to do.

Petitioner indirectly concedes that the restriction is reasonable as applied to persons not intending to reside permanently at the place of new residence, in the following statement on page 10 of his brief:

"* * * If the matter of concern were that persons in military service acquire a new residence by the order of their superiors and not by their own

choice, and that merely living in Texas is no proof of a desire to make it their permanent residence, then the remedy would be to prescribe what acts are necessary for military personnel to prove the requisite intent to establish permanent residence, rather than to prevent the possibility of establishing residence for voting, no matter what the quantum of proof that their intended home is their newly acquired residence. To foreclose this possibility is to arbitrarily deny military personnel stationed in Texas equal protection of the laws."

Respondent agrees with Petitioner, that if the present restriction is invalid, the state certainly should be able to impose more rigid requirements which military personnel must fulfill in order to establish a voting residence than is required of civilians, but if the present law is bad, Petitioner's suggestion itself would raise a question of denial of equal protection. Assuming that the state could prescribe acts necessary for military personnel to prove an intent to reside permanently at the place of new residence, what would those acts be? We submit that Petitioner's suggested remedy is unfeasible, and that the protection of the public welfare supersedes any inconvenience or hardship that Petitioner may incur from the restriction.

Let us consider the acts by which Petitioner has manifested an intent to make El Paso his permanent home.

Presence of his family. It is common knowledge that many married servicemen regularly take their families with them to whatever post they are assigned within this country, and even take them to foreign posts when military regulations permit. This cannot be taken as evidence of an intent to establish permanent residence.

Purchase of a dwelling place. "It is cheaper to buy than to rent" is a common slogan. Many married soldiers, having no intent to remain in the community longer than their military duties require, might still find it advantageous to buy a house for occupancy during that time and to sell it when they leave.[16]

Acquisition of a business. This is the only overt act alleged by Petitioner which might have any real value as evidencing an intent to remain permanently in El Paso. How many soldiers can put themselves into this narrow catagory? Must the state make special laws permitting soldiers to vote if they evidence an intent to become permanent residents by acquiring a business? And if this were made a *sine qua non* for voting residence; would the law be a fair one?

As a practical matter, it would be virtually impossible to mold a uniform law prescribing "acts necessary to prove the requisite intent" which would be both fair and meaningful. The situation in the final analysis reduces itself to having to accept the individual's word as to what his intent is for permanency of residence. Without impugning the integrity of the class, and making an observation which is equally applicable to all human beings, civilian and military, we submit that the state is left with small protection against the possible occurrence of the events which the law is designed to prevent if it must accept the statement of intent at face value. Declaration of intent as to what one is going to do at some remote time in the future is so subject

[16]See footnote 10, *supra*, citing *Ellis v. Southeast Construction Co.*, 158 F. Supp. 798, 804. In that case, the District Court commented on the weight which should be given to the purchase of a house as indicating a change of domicile.

to dissembling and is so open to change that it carries no guaranty.

So, if one concedes the validity of the purpose to exclude from suffrage those members of the armed forces who are only temporary residents of the community, one must also concede the validity of the exclusion of the entire class, because it becomes impracticable to separate the class. The Equal Protection Clause does not require that the state tailor its laws to prevent every case of inequity. "A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicely or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co., supra.*

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Supreme Court of Texas should be affirmed.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney
General of Texas

MARY K. WALL
Assistant Attorney General
of Texas

P. O. Drawer R
Capitol Station
Austin, Texas 78711
Attorneys for Respondent

PROOF OF SERVICE

I, MARY K. WALL, one of the attorneys for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of December, 1964, I served copies of the foregoing Brief for Respondent on WAYNE WINDLE and W. C. PETICOLAS, attorneys for Petitioner, by mailing two copies to them in a duly addressed envelope, with first class air mail postage prepaid, at the address of Suite 12-E, El Paso National Bank Building, El Paso 1, Texas.

MARY K. WALL

INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 82

SERGEANT HERBERT N. CARRINGTON,

Petitioner,

vs.

ALAN RASH *et al.*,

Respondents.

REPLY BRIEF FOR THE PETITIONER

Petitioner's Reply to Respondent Carr's Argument I

In Respondent Carr's brief his first argument (pages 4-7) is that the cases which hold that the equal protection clause applies to suffrage should be re-examined in light of historical material presented in Justice Harlan's dissenting opinion in *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

Petitioner submits that it is unnecessary for this court to re-examine its numerous holdings applying the Fourteenth Amendment to voting rights. If the equal protection clause protects any rights from discriminating state laws, it certainly protects voting rights which are basic in our democracy. Authorities supporting this proposition are numerous. See the majority opinion in *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

Petitioner's Reply to Respondent Carr's Argument II

In Respondent Carr's second point (pages 7-13), he argues that when Congress re-admitted Texas to the union in 1870, it interpreted a provision in the Texas constitution which disfranchised servicemen, as not violating the Fourteenth Amendment. Petitioner submits that it is improbable that Congress, in re-admitting Texas to the union, gave any deliberate consideration to any questions analogous to the constitutional question presented in this case. Therefore, any constitutional interpretations made by Congress when it re-admitted Texas to the union, should be given little or no consideration in deciding this case.

Respondent Carr made this same argument in *Mabry* v. *Davis*, 232 F.Supp. 930 (1964). At page 938, the three-judge court summarily disposed of the contention by referring to the following statement from Chief Justice Warren's opinion in *Reynolds* v. *Sims, supra*:

> "Congress simply lacks the constitutional power to insulate states from attack with respect to alleged deprivations of individual constitutional rights."

Petitioner's Reply to Respondent Carr's Argument IIIA

In Respondent Carr's Argument IIIA (pages 13-18), he says, "Voting is a privilege and not a right." (See Respondent Carr's brief, pages 2 and 13.) In *Wesberry* v. *Sanders*, 376 U.S. 1, 11 L ed. 2d 481 at 492 (1964), Justice Black made it abundantly clear that Art. I, Sec. 2 of the Constitution, "gives persons *qualified* to vote a constitutional right to vote . . . " The recent apportionment cases cited on pages 11-14 of the Brief of the Petitioner clearly establish

that the Fourteenth Amendment protects the right to vote of all *qualified* voters.

The effect of Art. VI, Sec. 2 of the Texas Constitution is to disfranchise all Texas servicemen who entered the service outside of the State of Texas. Thus, this court must determine whether or not the Fourteenth Amendment will permit the State of Texas to classify a serviceman residing in Texas as an *unqualified voter* solely because he is in the military service and did not reside in Texas when he entered the service. Petitioner submits that it is unreasonable for the State of Texas to classify members of the military service as *unqualified voters* solely for the reason that they are in the military service and resided outside of the state when they entered the service.

Petitioner's Reply to Respondent Carr's Argument IIIB

In Argument IIIB of Respondent Carr's brief (pages 18-34), he presents the historical background of the military voting laws in Texas. He refers to the historical fact that in 1836, after the Battle of San Jacinto, members of the military were rebellious and posed a serious threat to civil authority. After presenting such fact, the brief states: "Burned as a child, Texas has continued to be wary of the fire . . . " Respondent Carr is apparently saying that Texans presently fear members of the military because of the incident that occurred in 1836. Petitioner submits that the military structure in this country has changed substantially in the past 120 years, and that therefore the voting restrictions on servicemen which may have been reasonable in 1845 are not necessarily reasonable today.

On pages 20 and 22 of Respondent Carr's brief, he indicates that Texas, by restricting servicemen's voting

rights, is counter-attacking "a threatened danger." The "threatened danger" seems to be that if servicemen could vote in the county where they are stationed, a "strongwilled, determined commander," through "pressure" and "persuasions," could control the votes which would determine the outcome of the local election and he could thereby dictate the policy of the community. (See pages 22 and 23 of Respondent Carr's brief.)

Since all elections in Texas are by secret ballot, the "pressure" or "persuasion" that could be exercised by a military commander could not be so coercive that the military voter could be prevented from voting his own convictions once he entered the voting booth or began marking his secret ballot. (See Article VI, Section 4 of the Texas Constitution which provides that all elections shall be by secret ballot.) If the military voter at the time he casts his ballot chooses to yield to such "pressure" or "persuasion" and vote as his commanding officer desires, he has a right to do so. Likewise, civilian voters, as a result of "pressure" or "persuasion" may choose to vote in accordance with the desires of their employers, or their Labor Union officers, or the officers of their professional organizations, or some other persons in positions of authority.

The State of Texas, by restricting the servicemen's voting rights for the reason that they might be persuaded to vote in accordance with the desires of their commanding officers, is unreasonably distinguishing servicemen from civilians and such distinction denies servicemen equal protection of the laws.

Respondent Carr, in Argument IIIB, further contends that the State of Texas should be allowed to prevent a concentration of military voting strength in areas where military bases are located because the balance of power in

a particular community might rest with a group whose members are only *temporary residents* of the place where they are stationed. Petitioner will readily admit that there are many members of the military service stationed in Texas who do not meet the residence requirements and, therefore, such servicemen should not be allowed to vote. Petitioner's contention is that if a serviceman does meet the same residence requirements that are imposed upon all civilians regardless of their occupations, then such serviceman should not be denied the right to vote in the county of his residence solely because he is in the military service.

On page 27 of Respondent Carr's brief he contends that "The temporary nature of the soldier's residence at his duty station . . . " constitutes "a reasonable basis for excluding him from the privilege of voting at that place." If the matter of concern were that a soldier's residence is of a temporary nature then it would seem that the State of Texas would also disfranchise the soldier's wife who has met the very same residence requirements as the soldier. Yet the wife can qualify to vote in the county where her husband is stationed. Certainly the residence of a soldier's wife is as temporary as that of her military husband. To distinguish between the two denies members of the military equal protection of the laws.

Respondent Carr, on page 3 of his brief, argues that, since members of the military are "only temporary residents of the place where they are stationed" they "might lack a proper understanding of local problems and a proper concern for the best interest of the community." There are many groups of civilians who could fit into this category. For example, employees of large national corporations are often employed for a limited number of years in a particular local community and for that reason they "might lack a proper understanding of local problems." Also, members of college faculties, as well as graduate students, are

often located at a particular school for a limited number of years, and they "might lack the proper understanding of local problems and a proper concern for the best interest of the community."

Respondent Carr apparently is contending that the civilians are the only voters in a community that should be allowed to determine what is in the best interest of the community. Petitioner contends that if the majority of the voters in a community are members of the military, then that majority should be given a voice in determining the "best interest of the community." To distinguish a serviceman from a civilian because a serviceman "might lack a proper concern for the best interest of the community" denies a serviceman equal protection of the laws.

Petitioner's Reply to Respondent Carr's Argument IIIC

Respondent Carr says that "the restriction on place of voting is not a denial of voting rights." (See page 3 of Respondent Carr's brief.) This statement is incorrect. The voting restriction imposed upon servicemen by the Texas Constitution denies Petitioner the right to vote anywhere in any local, state or national election so long as he remains in the service and resides in Texas. Respondent Carr recognizes this fact but contends that Petitioner and other servicemen similarly situated "voluntarily" gave up their right to vote when they selected Texas as the state of their residence. Petitioner never voluntarily gave up his voting rights. If he had, he would not be going to the trouble and expense of this litigation in order to gain the right to vote. Because of the Fourteenth Amendment no citizen of the United States can be forced to "voluntarily" relinquish his right to vote merely by choosing to reside in a particular state.

Petitioner's Reply to Respondent Carr's Argument IIID

Respondent Carr in Argument IIID (pages 39-42) states that there are "substantial distinguishing characteristics" between the military profession and other professions and occupations. On pages 40 and 41 of his brief he lists several characteristics of the military profession which might distinguish it from other professions and occupations. Petitioner submits that none of the distinguishing characteristics present a valid reason for denying servicemen the right to vote in the county of their residence. One distinguishing characteristic listed by Respondent Carr is that there is "cohesion" among military groups. If cohesion among members of a group can constitute a valid reason for restricting the voting rights of members of the group, then the State of Texas could probably restrict the voting rights of members of numerous other organizations, such as the Teamsters Union, the National Association for the Advancement of Colored People, and the American Medical Association.

Petitioner's Reply to Respondent Carr's Argument IIIE

In Argument IIIE of Respondent Carr's brief, he recognizes that Petitioner is a bona fide resident of El Paso County. However, Respondent Carr states that Petitioner's acquiring a bona fide residence in Texas is not typical of members of the military stationed in Texas. Petitioner submits that there are other servicemen stationed in Texas who, like Petitioner, have established a bona fide residence in Texas after entering the service in another state. Some servicemen have passed up promotions in order to remain at their newly acquired residence in Texas. Some servicemen are homeowners and have paid local and state taxes

for many years. Petitioner is certainly not the only serviceman in Texas who can prove, if given the chance, that he is a bona fide resident of the state.

In Argument IIIE of Respondent Carr's brief, he indicates that the voting restriction in question may impose some inequities in a few isolated cases. However, Respondent Carr contends "that the classification is not rendered invalid by reason of the fact that isolated cases of inequity may arise under it." Respondent Carr apparently contends that it is not improper for the State of Texas to restrict the voting rights of those servicemen who happen to be able to meet the same residence requirements as civilians. Petitioner submits that the right to vote in a democracy is so basic and so essential that such right should never be restricted by any state unless the state can show that an overwhelming public interest will be served by such a restriction. Respondent Carr, in his brief, has failed to present any valid reasons which could justify the voting restrictions placed upon servicemen by the Constitution of the State of Texas.

Conclusion

For reasons stated it is respectfully submitted that the Judgment of the Court below should be reversed.

Respectfully submitted,

WAYNE WINDLE
W. C. PETICOLAS
Suite 12-E
El Paso National Bank Building
El Paso 1, Texas
Attorneys for Petitioner

PETICOLAS, LUSCOMBE AND STEPHENS
of Counsel

INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 82

SERGEANT HERBERT N. CARRINGTON,
Petitioner

vs.

ALAN V. RASH, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

---

SUPPLEMENTAL BRIEF FOR RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Pursuant to Paragraph 5 of Rule 41, Rules of the Supreme Court, Respondent Waggoner Carr moves for leave to file the attached supplemental brief, and makes the following statement in support of the motion.

On page 21 of his brief in chief, Respondent quoted from an article by Abner V. McCall, Dean of the School of Law, Baylor University, describing the precursor of the present Texas law, which completely disfranchised military personnel, as a "novel" provision "no doubt inspired by the mutinous conduct of the non-

resident volunteers who had been recruited in the United States after the Battle of San Jacinto" in the year 1836. Independent research into the background of this provision on January 21 and 22, 1965, revealed that the historian had been inaccurate in saying that this was a novel provision, and further revealed that the incidents mentioned as having inspired the provision were at most only a contributing factor in its having been preserved in future constitutions of the State.

This new material does not have a major bearing on the merits of the case, and we are not even sure whether it is favorable or unfavorable to Respondent's position, but we do not wish to be instrumental in causing or perpetuating an historically inaccurate statement. We would be especially chagrined if the Court happened to refer in its opinion to the historical background of the present law and repeated the inaccuracy because of our failure to point it out.

Counsel for Respondent intended to call this new matter to the Court's attention during oral argument, but more time than had been anticipated was consumed in answering questions from the Bench and we were unable to reach this subject. We ask leave to file this supplemental brief so that the record may now be set straight.

SUPPLEMENTAL BRIEF

On page 21 of his main brief, Respondent quotes from an article written in 1952 by Abner V. McCall, Dean of the Law School of Baylor University, on "History of Texas Election Laws," which states that the first election law passed by the Republic of Texas in 1837 contained a "novel" provision which disfran-

chised persons in military service, and that this provision "was no doubt inspired by the mutinous conduct of the nonresident volunteers who had been recruited in the United States after the Battle of San Jacinto" in 1836.

During the week preceding oral argument in this case, in preparation for argument and possible questions from the Bench on details of the occurrences in 1836, we undertook to do some original research into the background of the Texas law. The disfranchising provision first came into the law as a statute passed in 1837. It was embodied into the Constitution in 1845, and remained in each succeeding Constitution until replaced by the present provision in 1954.

The journals and debates of the 1845 constitutional convention are contained in over 1100 unindexed pages, and we had not previously attempted to locate the portions dealing with this provision. Neither had we previously read any historical accounts of the events of 1836-37.

From our research in the State Archives, we concluded that the historian was correct in conjecturing that the army's conduct had been the immediate inspiration of the 1837 statute, but we also discovered an enlightening history of the provision in the 1845 Constitutional Convention, which showed that it was not a novel provision, as the historian had thought, and that it was motivated by considerations in addition to the possibility of a concerted military take-over at the polls.

The franchise article of the proposed Constitution of 1845, as originally drafted, had made no reference

to persons in military service. The following is reported on page 159 of the Debates of the Convention:

> "Mr. Anderson moved to insert 'providing that no soldier, seaman or marine belonging to the army or navy of the United States, shall be entitled to vote in any election to be held under this Constitution.'
>
> "He thought no argument was necessary to convince the mind of the necessity of this provision. It was sustained by precedents, being contained in nearly every State Constitution in the United States. Without something of the kind, those who should be introduced here for purposes of defence, would be permitted to mingle in elections, without knowing the wants and necessities of the particular county where they might vote, and might frequently elect an individual to represent us in some office of the State, contrary to the express wish of the county.
>
> "Amendment adopted."

So, we see that the motivation for preventing the military from voting was not only because they were subject to control which might result in concerted action at the polls, but also because they were likely not to know "the wants and necessities" of the locality where they might vote. This was before the time of absentee voting, and only in rare instances would a soldier on active duty have an opportunity to vote except in the locality where he was stationed.[1] At that time the actual effect of the disfranchisement was not greatly different from the present-day provision.

The assertion that a similar provision was contained

---

[1]See Note, 14 A.L.R. 1256, for a history of absentee voting laws.

in nearly every state constitution in the United States particularly caught our attention, because we had accepted the historian's statement that this was a "novel" provision. We made a check of early state constitutions[2] and found that Mr. Anderson had overstated the case but that seven of the other 27 States then in existence did have laws disfranchising persons in military service. A number of the other 20 States had dealt with the matter through laws pertaining to acquisition of residence. A summary of these laws is set out in an appendix to this brief.

During the Civil War, when many States enacted their first absentee voting laws in order to enable the volunteer soldiers to vote, these States apparently came to realize that this disfranchising provision accomplished more than they had set out to accomplish, in that it prevented the soldiers not only from voting at the place where they were stationed, but from voting back home as well.[3] By 1870, this provision had virtual-

---

[2]Early state constitutions are collected in *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, compiled under an order of the United States Senate by Ben. Perley Poore (Government Printing Office, 1877).

[3]Illustrative of the early absentee voting laws are those of Connecticut, added in 1864, and of Maine, added in 1865. Article of Amendment XIII to the Constitution of Connecticut, ratified in 1864, read:

> "Every elector in this State who shall be in the military service of the United States, either as a drafted person or volunteer, during the present rebellion, shall, when absent from this State, because of such service, have the same right to vote in any election of State officers, Representatives in Congress, and electors of President and Vice-President of the United States, as he would have if present at the time of his enlistment into such service. This provision shall in no case extend to persons in the regular Army of the United States, and shall cease and become inoperative and void upon the termination of the

ly disappeared, and in its place had been substituted a provision on acquisition of residence while in service.

Most States today have constitutional or statutory provisions dealing with acquisition of residence by persons in military service. We collected these laws for *Mabry v. Davis*, 232 F.Supp. 930 (W.D. Tex. 1964), and they are set out in Defendants' Exhibit D, which is a part of the appeal record in that case (*Davis v. Mabry*, No. 774, O.T. 1964). In some States, the law provides that a person in military service shall not be deemed to have gained a residence by being stationed on duty in the State, and this provision has been construed to mean that mere presence does not make the person a resident but that he may become a resident by choice. In some States, the law is worded to say that no person in military service *shall acquire* a resi-

---

present war. The general assembly shall prescribe by law in what manner and in what time the votes of electors absent from this State, in the military service of the United States, shall be received, counted, returned and canvassed."

Article of Amendment XII to the Constitution of Maine, ratified in 1865, read:

"But citizens of the State absent therefrom in the military service of the United States, or of this State, and not in the Regular Army of the United States, being otherwise qualified electors, shall be allowed to vote on Tuesday next after the first Monday of November, in the year of our Lord one thousand eight hundred and sixty-four, for governor and senators, * * *. On the day of election a poll shall be opened at every place without the State where a regiment, battalion, battery, company, or detachment of not less than twenty soldiers from the State of Maine may be found or stationed, and every citizen of said State of the age of twenty-one years, in such military service, shall be entitled to vote as aforesaid; and he shall be considered as voting in the city, town, plantation, and county in this State where he resided when he entered service. * * *"

dence by being stationed in the State, or uses other language indicating on its face an intent to prevent military personnel from becoming qualified electors at the place where they are stationed.

Petitioner has stated in his brief that so far as he can ascertain, Texas is the only State which denies voting privileges to a legal resident of the State solely for the reason that he is in the military service. Also, in *Maybry v. Davis* the Court quoted a statement by the Information and Education Office of the Department of Defense that "almost all states except Texas will permit persons in the Armed Forces to acquire a new voting residence."

Even if Petitioner's statement were correct, it would not condemn as unreasonable the public policy of this State against permitting a concentration of military voting strength. But many of the state provisions which are worded in terms evidencing an intent to prevent acquisition of residence have not been construed in the courts, and our correspondence with the Attorneys General in a number of these States convinces us that the suggested uniqueness of the Texas law is not accurate. It is true, however, that some of these provisions have been construed to mean merely that stationing does not automatically confer residence and that a person may become a resident if he chooses. Usually, the question has arisen in some context other than voting, the most usual being in divorce actions where the plaintiff sought to claim domicile and maintain the action at the place where he was stationed. See Note, 21 A.L.R.2d 1163.

The background of present-day provisions in the laws of other States which formerly had provisions

disfranchising persons in military service gives pretty clear indication that in instances where the law declares that no person in military service *shall acquire* a residence, it was intended to mean what it said. It is indeed questionable whether the courts have properly construed the law in some States, when they have held that the provision does not preclude the soldier or sailor from acquiring a voting residence during service.

We submit that the public policy of Texas in preventing soldiers from acquiring a voting residence where they are stationed is not an anomaly, but existed in other States also for long periods of time, and still exists elsewhere.

"But," one might argue, "granting that the courts have misconstrued the law in some of the States which had adopted the same policy, the fact that these States have not overturned the court decisions through legislative processes shows that the original policy to exclude them from voting where they were stationed had been found to be unnecessary." This conclusion does not follow, knowing as we all do how the populace, the same as an individual, may become inured to the presence of a canker and never go to the doctor to have it treated.

But even if it could be said that these States have wittingly and voluntarily abandoned their former public policy, that does not condemn as unreasonable or unnecessary the public policy of this State. Thirty-six States have declared, as a matter of public policy, that a citizen must have resided in the State for a year before he can vote, and two States require a residence of two years. Twelve States require a residence of only

six months.* Can it be said that the requirement of the other 38 States is rendered unreasonable because these 12 States make a lesser requirement? Or that literacy requirements for voting are to be struck down as unnecessary because many States do not have them, and their government survive without them? Certainly not.

In whatever light it is viewed, the recently-discovered historical material set forth in this brief cannot detract from the reasonableness of the present Texas law, and we submit that these historical precedents further substantiate its reasonableness and validity.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney
General of Texas

MARY K. WALL
Assistant Attorney General
of Texas

P. O. Drawer R
Capitol Station
Austin, Texas 78711

Attorneys for Respondent

*See table on p. 24 of *The Book of the States, 1964-1965*, published by The Council of State Governments.

PROOF OF SERVICE

I, MARY K. WALL, one of the attorneys for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of February, 1965, I served copies of the foregoing Supplemental Brief on WAYNE WINDLE and W. C. PETICOLAS, attorneys for Petitioner, by mailing two copies to them in a duly addressed envelope, with first class air mail postage prepaid, at the address of Suite 12-E, El Paso National Bank Building, El Paso 1, Texas.

MARY K. WALL

APPENDIX

Provisions in State Constitutions in the Year 1845 in Regard to Voting by Persons in Military Service

Texas was admitted to the United States in 1845 as the twenty-eighth State. The constitution adopted by the State of Texas in 1845 contained the following provision (Art. III, Sec. 1):

> "Every free male person who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, or who is at the time of the adoption of this Constitution by the Congress of the United States, a citizen of the Republic of Texas, and shall have resided in this State one year next preceding an election, and the last six months within the district, county, city, or town, in which he offers to vote (Indians not taxed, Africans and descendants of Africans excepted), shall be deemed a qualified elector: and should such qualified elector happen to be in any other county, situated in the district in which he resides, at the time of an election, he shall be permitted to vote for any district officer, provided that the qualified electors shall be permitted to vote anywhere in the State for State officers, *and provided further that no soldier, seaman, or marine in the Army or Navy of the United States, shall be entitled to vote at any election created by this Constitution.*" (Emphasis supplied.)

At that time the constitutions of seven other States had provisions excluding either all or some portion of the military from voting, as follows:

Alabama. Art. III, Sec. 5 of the Constitution of 1819, after stating the requisites for a "qualified elector," contained this proviso: "Provided, that no sol-

dier, seaman, or marine, in the regular Army or Navy of the United States, shall be entitled to vote at any election in this State."

Arkansas. Art. IV, Sec. 2 of the Constitution of 1836 contained the following provision: "* * * provided, that no soldier, seaman or marine, in the Army or Navy of the United States, shall be entitled to vote at any election within this State."

Indiana. Art. VI, Sec. 1 of the Constitution of 1816 read as follows: "In all elections not otherwise provided for by this Constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who has resided in the State one year immediately preceding such election, shall be entitled to vote in the county where he resides; except such as shall be enlisted in the army of the United States or their allies."

Louisiana. Article 12 of the Constitution of 1845 read as follows: "No soldier, seaman or marine in the Army or Navy of the United States, no pauper, no person under interdiction, nor under conviction of any crime punishable with hard labor, shall be entitled to vote at any election in this State."

Missouri. Art. III, Sec. 10 of the Constitution of 1820 contained this provision: "* * * * provided, that no soldier, seaman or marine in the Regular Army or Navy of the United States shall be entitled to vote at any election in this State."

South Carolina. Art. I, Sec. 14 of the Constitution of 1790 was amended in 1810 to add the exceptions to its franchise provisions. As amended, the section read: "Every free white man of the age of twenty-one years,

paupers, and non-commissioned officers and private soldiers of the Army of the United States excepted, being a citizen of this State, * * * shall have a right to vote * * *."

Virginia. Art. III, Sec. 14 of the Constitution of 1830 contained this provision: "* * * provided, nevertheless, that the right of suffrage shall not be exercised by any person of unsound mind, or who shall be a pauper, or a non-commissioned officer, soldier, seaman, or marine in the service of the United States, or by any person convicted of any infamous offence."

The constitutions of the following States, in conjunction with provisions defining who was entitled to vote, contained provisions regarding acquisition of residence (domicile) during military service, stating that no person in military service "shall be deemed a resident of the State in consequence of being stationed therein," or "shall acquire a residence by being stationed in the State," or making some similar provision:

Delaware—Constitution of 1831, Art. IV, Sec. 1.

Florida—Constitution of 1838, Art. VI, Sec. 1.

Maine—Constitution of 1820, Art. II, Sec. 1.

Michigan—Constitution of 1835, Art. II, Sec. 6.

New Jersey—Constitution of 1844, Art. II, Sec. 1.

Rhode Island—Constitution of 1842, Art. II, Sec. 4.

The constitutions of the following States contained provisions defining who was entitled to vote, but made no specific mention of persons in military service, either in regard to voting or in regard to acquisition of residence: Connecticut, Georgia, Illinois, Kentucky, Mary-

land, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Tennessee, and Vermont. Several of these States later added provisions pertaining to acquisition of residence while in military service. See Defendants' Exhibit D in the appeal record in *Davis v. Mabry,* Docket No. 774, O.T. 1964.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 82

SERGEANT HERBERT N. CARRINGTON,
Petitioner

vs.

ALAN V. RASH, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

REPLY BRIEF FOR RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS
(Answering Reply Brief for the Petitioner)

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General of Texas

MARY K. WALL
Assistant Attorney General of Texas
P. O. Drawer R
Capitol Station
Austin, Texas 78711

Attorneys for Respondent

INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 82

SERGEANT HERBERT N. CARRINGTON,
Petitioner

vs.

ALAN V. RASH, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

---

REPLY BRIEF FOR RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS
(Answering Reply Brief for the Petitioner)

MOTION FOR LEAVE TO FILE REPLY BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Pursuant to Paragraph 3 of Rule 41, Rules of the Supreme Court, Respondent moves for leave to file a reply brief in answer to the reply brief for the Petitioner. Respondent had intended to answer in oral argument the contentions made in Petitioner's reply brief and had thought that a written reply would not be necessary. However, more time than anticipated was consumed in answering questions from the Bench, and the matters covered in the attached brief were not reached in oral argument. Respondent believes that they deserve an answer, and therefore requests leave to file this reply brief.

REPLY BRIEF

I.

Petitioner states on page 6 of his reply brief that "because of the Fourteenth Amendment no citizen of the United States can be forced to 'voluntarily' relinquish his right to vote merely by choosing to reside in a particular state."

Under the laws of all the States, only those persons who are legal residents of the State may vote—mere sojourners are never allowed to vote; and no new resident can vote in state and local elections until he has resided within the State for a prescribed length of time. The most usual period is one year, but two States require a residence of two years. During this period, the new resident is completely disfranchised. Yet this requirement has been sustained against attacks of unconstitutionality. *Pope v. Williams,* 193 U.S. 621 (1904); *Drueding v. Devlin,* 234 F.Supp. 721 (D. Maryland, 1964). So we see that every new resident is forced, for a time, to "relinquish his right to vote merely by choosing to reside in a particular state," and that is all that Petitioner, having chosen to become a resident of El Paso, is being required to do.

The recent case of *Drueding v. Devlin, supra,* which is now pending on appeal to this Court, as Docket No. 772, on the question of the validity of the length-of-residence requirement as applied to voting in elections for President and Vice President, reiterates the usual statement that one of the purposes of the rquirement is to insure that the voter will "become in fact a member of the community, and as such have a common interest in all matters pertaining to its government."

No matter how strongly a soldier might wish to remain at his present station, he has no volition in the matter. He is subject at all times to the orders of his superiors, which may take him away from there whether he wishes it or not. Actually, he is never more than a sojourner throughout his period of service. As long as he continues in military status, he cannot "become in fact a member of the community." So the same reason which justifies withholding voting privileges from a new resident for the one year or the two years provided by state law also justifies withholding voting privileges from a new resident in military service throughout his period of service.

The Texas law permits a soldier to acquire a residence during service for all purposes except voting. It is our contention that the State could lawfully deny to military personnel a right to acquire a new residence within the State for any purpose while they are in service because of this impermanence which inheres in their stationing; and if the State does allow them to acquire a new residence, it may prescribe the conditions and it may regulate the privileges which attach to the residence thus gained.

The soldier's presence at the place where he is stationed is not voluntary. He is there by order of superior authority. With respect to other classes of persons, the general rule is that residence may not be acquired by involuntary presence. This is an application of the legal principle which denies to certain classes of persons the power to select their domicile—they simply lack the capacity to make a choice. Thus, persons who are confined in prison cannot acquire residence at the place of confinement, even though they may intend to

remain in that community after confinement ends. This rule appears to be followed without exception, and has been formulated into § 21 of the Restatement of Conflict of Laws under the following general rule:

> "A person cannot acquire a domicil of choice by any act done under legal or physical compulsion."

Comment (a) of this section states that "a person does not acquire a domicil of choice in a place which he cannot legally leave when he chooses to do so. The fact that he decides not to leave is immaterial; as also is his legal right and intention to remain after the period of legal detention expires." The following is given as an illustration:

> "A's domicil is X. A is released from jail on bond and required to live within a prescribed area, Y. A rents a house in Y, sends for his family, lives in Y for years and announces that he has no intention of leaving Y when the period of required residence expires. A, during the period of required residence in Y, is still domiciled in X."

This lack of volition is also the ground on which the courts in a large number of States hold that a person in military service cannot acquire a residence while living in assigned quarters at a military post, regardless of what his intent may be; and some courts, especially in earlier days, have applied the rule to all military personnel. The Restatement of Conflicts sets out the following rule in Comment (c) of § 21:

> "c. *Soldiers and sailors.* A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, cannot acquire a domicil there though he lives in the assigned quarters with his family; for he must obey orders and cannot choose to go elsewhere. If, however, he is

allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duty, he can acquire a domicil where he lives."

Cases holding that a person in military service cannot acquire a domicile while living in assigned quarters are collected in a note in 21 A.L.R.2d at page 1173.

To our knowledge, there has never been any holding, or any intimation, that a state law prohibiting a soldier from acquiring residence while living on the post exceeds the authority of the State to prescribe the conditions under which residence can be acquired. But those living off the post are present in the community because they are under military orders stationing them there. They are in the same position as the parolee who is compelled to remain within a prescribed area. It would be within the power of the State to deny to them also legal ability to acquire a residence during that period of time. So far as we can find, there has never been a case holding otherwise.

The analogy to prisoners is perhaps unsavory, so let us make another analogy. The rule in most States, including Texas, is that the husband selects the domicile, and the wife has no choice in the matter. Suppose Sergeant Carrington had not chosen to claim El Paso as the place of family domicile. No matter how much Mrs. Carrington might want El Paso to be the family's permanent home, *she* could not establish legal residence there for herself or for any member of her family, because she has no power to choose. The same principle would support a rule preventing Sergeant Carrington or anyone else in military service from acquiring legal residence during service. He does not and cannot choose

where he is to be stationed or how long he remains. The United States Army chooses for him.

II.

On pages 5 and 7 of his reply brief, Petitioner says that there are many groups of civilians who possess the same characteristics as servicemen, and argues that the servicemen are denied equal protection because these civilians are not subjected to a similar limitation on place of voting.

On the characteristic of cohesion, he mentions the Teamsters Union, the NAACP, and the American Medical Association as examples. On the characteristic of impermanence of residence, he mentions members of college faculties and graduate students, and also "employees of large national corporations, who," he says, "are often employed for a limited number of years in a particular local community."

Whether members of the groups Petitioner mentions display the sort of cohesion we are talking about is debatable. The members of each group have common interests and outlooks in certain fields, and in those fields they are likely to think and vote in the same manner, not because they belong to the group but because that is the way they believe. More important, Petitioner does not contend that there are civilian groups possessing all of the several characteristics which have influenced the imposition of the restriction on place of military voting, and we submit that none exists within the State of Texas. The validity of the classification is to be tested by the sum of all the elements which contribute to its reasonableness, and not by each separate element standing alone. The concur-

rence of the concentration of military personnel within a small geographical area, cohesion of the members, subjection to superior authority, impermanence of residence, absence of self-choice on whether to go or to remain—all these elements taken together—provides the backdrop for the restriction.

If other groups possessing similar characteristics do exist, the burden is on Petitioner to prove it. But in fact none could exist, because no civilian can be compelled to go from or to stay in any particular place except persons under sentence of confinement or under compulsory medical treatment.

Even granting the existence of civilian groups possessing all the material characteristics, the fact that the State has not acted to restrict their voting to the last place where they lived before they took up their nomadic occupation does not invalidate the restriction on military voting. The cases are legion which hold that a classification is not rendered invalid merely because it fails to cover "the whole field of possible abuses." The rule was stated again by this Court only last December, in *McLaughlin v. Florida,* 85 S.Ct. 283, 288, in this language:

> "Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some rather than all of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious."

On page 5 of his reply brief, Petitioner says that there are no differentiating characteristics between the

servicemen and their wives, who are allowed to vote at a place of residence acquired while their husbands are in service, and that to distinguish between the two denies the military husbands equal protection of the laws. However, there *are* differentiating characteristics. The wife is not subjected to indoctrination programs designed to instill loyalty to the commanding officers and the organization, nor would she be subjected to indoctrination in concepts and views favored by a commanding officer. She is not subject to military discipline—she can't be put on KP, or restricted for the week end. If the husband is ordered to some other base, she is not compelled to go also. In fact, in *Mabry v. Davis* both plaintiffs testified that if they were ordered elsewhere, their wives would remain in San Antonio. Further, as a practical matter, the restriction on the husband's place of voting operates as a check on the number of wives who become voters at the place where their husbands are stationed. It acts as a deterrent to acquisition of residence by the husband, and since the wife's residence is fixed by that of the husband, the threat posed by not also restricting place of voting of the wives is substantially diluted by the restriction on the husband. If on no other ground, failure to include the wives could be justified on the lesser magnitude of the threat posed by their group.

III.

Petitioner in effect has said on page 3 of his reply brief that even though the State's public policy may have been sound in 1837, it is no longer sound because the military structure in this country has changed substantially in the past 120 years. In answer to this, we are content in this brief merely to cite the Chief Jus-

tice's statement in 1962, quoted on page 20 of our main brief, that the axiom of subordination of the military to the civil is not an anachronism today. Military structure may have changed, but those characteristics of military life and military authority which motivated the Texas law continue to exist today.

This is as good a place as any to answer the contention which Petitioner has made on page 4 of his reply brief that the secret ballot is ample protection against the coercion of a commanding officer. The number of members of his command who were eligible to vote and who actually did vote within each voting precinct could readily be ascertained,[1] and the entire group could be made to feel his retaliation if the number of votes favorable to his desires did not measure up to his expectations. Anyone who has served as a private, as the writer did during World War II, knows that group punishment for misdeeds that cannot be pinned on the individual culprits is not a figment of the imagination.

IV.

On page 7 of his reply brief, Petitioner says that Respondent, though recognizing that Petitioner is a bona fide resident of El Paso County, claims that Petitioner's acquiring a bona fide residence in Texas is not typical of members of the military stationed in Texas. He says that there are other servicemen similarly situated, but he offers no proof or even a surmise as to their number.

We do indeed contend that Petitioner, in averring

[1]The lists of qualified voters (those eligible to vote) and the poll lists (those who actually vote) are open to public inspection. Arts. 3.02, 5.22, and 8.29b, Vernon's Texas Election Code (Amendments of 1963).

an intent to reside in the county where he now lives "for the remainder of his life" (R. 3) is not typical of military personnel who potentially are claimants or who actually do claim legal residence at the place where they are stationed.

As stated in our main brief, pp. 23-24, all that a serviceman must be able to show in order to establish residence at his duty station is that he does not intend to return to the place last claimed as his home and that he intends to remain at his present station until ordered elsewhere. As applied to Petitioner, he would not have to show that he intended ever to come back to El Paso if he were sent elsewhere, or that he intended to stay in El Paso after completing military service if he were not sent elsewhere before then.

Parenthetically, contrary to the intimation on page 7 of Petitioner's reply brief, we do not say that persons who acquire residence without an intent to remain permanently are not "bona fide" residents. What we do say is that a person in military service whose residence is based merely on an intent not to go back to where he came from is in effect no more than a sojourner, because his military duty may take him away to some other place at any moment, without any intent on his part ever to return.

Petitioner says that there are other servicemen who have acquired a residence in Texas with the intent of making it their permanent home. The two plaintiffs in the *Mabry* case are in this category. We have no doubt that there are also some others; but how many? We reiterate that they are not typical of military personnel generally. It is our contention that even as to them there is a rational basis for treating them in the same

manner as all other military personnel. Since the choice is not theirs as to their present location, they are unable to have more than a present intent to make a certain place their home at some time in the future, after termination of their military career. It is the universal rule that intent to make one's home at a place at a future date will not support a claim of present residence there.

But even if there was no rational basis for treating Petitioner and others similarly situated in the same manner as all other military personnel, the fact that they are subject to an inequality will not render the law invalid if they constitute merely isolated examples out of the whole class. In the language of this Court in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, "a classification having some reasonable basis does not offend against the Equal Protection Clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." This rule has been repeated time and again. If the number is so substantial that the group should be treated as a separate class, the burden is on Petitioner to prove the fact. This he has wholly failed to do.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney
General of Texas

MARY K. WALL
Assistant Attorney General
of Texas

P. O. Drawer R
Capitol Station
Austin, Texas 78711

Attorneys for Respondent

PROOF OF SERVICE

I, MARY K. WALL, one of the attorneys for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of February, 1965, I served copies of the foregoing Reply Brief on WAYNE WINDLE and W. C. PETICOLAS, attorneys for Petitioner, by mailing two copies to them in a duly addressed envelope, with first class air mail postage prepaid, at the address of Suite 12-E, El Paso National Bank Building, El Paso 1, Texas.

MARY K. WALL